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As many Section members know, one of the key benefits of alternative dispute resolution is the opportunity to resolve disputes early, rather than allowing them to intensify and wind their way through our court systems. More than a year ago, the Dispute Resolution Section initiated a task force whose objective was, in part, to create a user guide that would be of value to practitioners, lawyers and the public in developing systems or procedures that would facilitate Planned Early Dispute Resolution (PEDR). This work builds upon earlier efforts of the International Institute for Conflict Prevention and Resolution (CPR), which decades ago initiated a “corporate pledge” for businesses and law firms to promise that they would consider alternative forms of dispute resolution before initiating litigation.

The Section Task Force was chaired by Professor John Lande of the University of Missouri School of Law, and the guide was co-authored by Kurt L. Dettman and Catherine E. Shanks. The Task Force plans to submit its report, which will include a Planned Early Dispute Resolution User Guide, to the Section of Dispute Resolution Council at the ABA’s annual meeting in San Francisco on Saturday morning, August 10. The meeting is open, and members are welcome to attend.

The Task Force’s purpose was to promote Planned Early Dispute Resolution by lawyers, businesses and clients, in hopes they all could benefit from the services of a neutral dispute resolution professional at the earliest appropriate time. Planned Early Dispute Resolution is an approach that constitutes a major change from traditional approaches to dispute resolution, not merely a shift in procedures; as outlined in the forthcoming guide, comprehensive PEDR systems generally are expected to include plans for preventing and resolving disputes, early warning systems for issues that may lead to disputes, identification and monitoring of disputes, early case assessments and efficient procedures for handling and resolving disputes.

The draft guide has broad support: It has been reviewed and is being co-sponsored by the American Arbitration Association (AAA), the International Institute for Conflict Prevention and Resolution and JAMS — the Resolution Experts. Moreover, the guide will be available to members of the Dispute Resolution Section in an online format that will permit members, bar associations and other organizations to utilize the guide in developing procedures. Much work has gone into this Planned Early Dispute Resolution User’s Guide, and we express our appreciation to Professor Lande, Kurt Dettman, Catherine Shanks, and other members of the Task Force who worked to produce such a valuable resource.

Later this year, on October 22, a delegation of approximately 15 members of the Dispute Resolution Section, including myself, Incoming Chair Ruth Glick and Incoming ABA President Jim Silkenat, will travel to Vietnam and Thailand in an effort to expand the international outreach of our Section. Traveling at our own expense, members of the delegation will visit with judges and government officials as well as early adopters of mediation in Hanoi and Bangkok.

Chuck Crumpton, who teaches in Hawaii and Vietnam, will be leading the delegation in Vietnam and has arranged for top government officials to discuss the status of mediation in Vietnam and cultural differences as well as traditional means of dispute resolution in that country.

I will be leading the delegation to Thailand, where we will be hosted by Vanchi Vatanaspat, who has been active in bringing a more Western-style mediation to the Thai courts as well as community mediation. A physician by training, Professor Vatanaspat now teaches mediation while remaining active on the boards of hospitals in Thailand. We will also be joined by Judges Adoon, Patchaya and former Judge Chotechuang of the Law Society of Thailand, as well as Ministers of several Thai government departments. We will also make an excursion to Koh Samui Island, to discuss community resolution of carbon footprint and environmental impacts on resort communities.

We hope you take a few hours during your summer to enjoy reading some of the dispute resolution books that are reviewed in this issue. I know that they have motivated me to add to my already-extensive summer reading list. This issue also includes two new features. “Profiles in ADR” will interview an influential (and we hope inspirational) person within the field. “Research Insights” provides brief snapshots of social science research studies that can inform us about dispute resolution practice. I extend great appreciation to our hard-working Magazine editorial board members, who have brought these illuminating features to us.

John R. Phillips is Chair of the American Bar Association Section of Dispute Resolution and a partner at the law firm of Husch Blackwell LLP in Kansas City, Chicago & St. Louis. He can be reached at john.phillips@huschblackwell.com.
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Art Hinshaw, J.D. ’93, LL.M. ’00
Partner, Husch Blackwell LLP
Jefferson City, Missouri

Earning my LL.M. from Mizzou opened doors for me, enabling me to move comfortably from a mediator in private practice to one who is responsible for the design and implementation of a complex program. What I value most is coming away with a sophisticated understanding of the theories behind the practical issues that come up every day in my job.

Andrea Braeutigam, LL.M. ’05
Executive Director
Oklahoma Agricultural Mediation Program, Inc.

When I enrolled in the LL.M. Program, all I wanted was a jump start on an ADR career. I found a discipline far richer than I thought, a faculty that challenged and sharpened my analytical abilities, and the opportunity to make significant contributions to a burgeoning field. My time at Missouri not only opened a new career path, it led me places I never thought possible.

Lowell Pearson, LL.M. ’00
Partner, Husch Blackwell LLP
Jefferson City, Missouri

My LL.M. education influenced my current job because I started a practice in mediation and arbitration, and I was able to join the Center of Arbitration and Mediation of the Chamber of Commerce of Quito, the most important center of this kind in Ecuador. I discovered a new world for my professional activities and academic development, which I share with others in my country.

María Elena Jara Vasquez, LL.M. ’04
Associate Lawyer, Noboa, Peña, Larrea, Torres & Asociados Cia. Ltda.
Professor, Andean University Simon Bolivar
Quito, Ecuador

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Anatomy of a Mediation
A muscular, individualistic, mediator-centric approach
Reviewed by Judith Meyer

This is James C. Freund’s 10th book. There is something to be said about a mediator sufficiently passionate about his calling that he will commit the time to writing this prolifically about it. But passion and commitment are nothing new to Freund, who was a partner at the head-of-the-pack mergers and acquisitions firm of Skadden, Arps, Slate, Meagher & Flom and spent years negotiating supercharged mergers and acquisitions before segueing into the world of mediating deals that have gone awry. In his law practice, Freund represented Dun & Bradstreet in its acquisition programs and defended Trans World Airlines and Federated Department Stores against hostile takeovers. With such an energetic, high-powered history, it’s not surprising that Freund writes not only about his trade: a committed New Yorker, he has also produced two collections of photographs of Central Park and New York streets.

In Anatomy of a Mediation: A Dealmaker’s Distinctive Approach to Resolving Dollar Disputes and Other Commercial Conflicts, Freund offers a very muscular, individualistic, mediator-centric approach to mediation. As a former deal-maker — he repeatedly tells us he was not a trial lawyer — he intimately understands the art of the deal. He acknowledges that his book unashamedly concentrates on his style of mediating. While his style is unique, he offers lessons to all committed mediators.

He divides the book into five topics: The Case for Mediation, Mediating the Dollar Dispute, Deal-Dispute Mediating, Mediating Multi-Party Disputes and Representing a Party in Mediation. He also includes in an appendix a version of his “Pep Talk to the Parties,” a negotiation coach’s energizing opener to mediation.

The most controversial approach to mediation is laid out in Part II, Mediating the Dollar Dispute, where I will focus for this review. The “dollar dispute” is one in which everyone is claiming value, and the more money that ends up in the plaintiff’s pocket, the less remains in the defendant’s checking account. It is in this approach, where only dollars are at stake, that Freund veers most dramatically from the generally facilitative and shuttle diplomacy approach with which we are most familiar.

The Dollar Dispute
Here’s Freund’s approach: in a one-shot, high-dollar dispute, the mediator holds a brief joint session, then keeps all parties in separate caucus. The mediator shuttles between the two parties and — here is the kicker — does not let them exchange proposals. The parties never offer proposals directly to each other, which is a given in typical mediations. In the Freund scenario, they do not even exchange proposals indirectly through the mediator. The parties, in fact, do not know what each other’s compromises may be until the mediator gives them his best suggestion for a deal. Freund believes that in a case where currency is the only thing to be
negotiated, by tightly controlling the process and not allowing parties to exchange offers, he keeps the parties committed and on track.

Freund tells you up front that he is not a disciple of the Getting to Yes cooperative approach to resolving controversies. He brings a different mentality to dispute resolution, and his deal-maker’s mentality gives rise to the distinctive approach he endorses. He eschews the facilitative model, which is the norm for the early and middle stages of most commercial mediations, and he endorses the evaluative mode.

In Freund’s approach, neither side knows where the other stands until the end, forcing each to concentrate on how much it can sensibly afford to pay (or accept) to settle the dispute without being distracted or insulted by the other side’s maneuvering. The mediator engages in confidential negotiation between himself and each party, trying to find a resolution level that will be acceptable to both. To test each side’s reality, the mediator is evaluative and judgmental, taking issue with views he considers unrealistic. At the end of the day, having moderated each party’s excessive demand or meager offer in his own mind, the mediator gives his proposed recommendation for a compromise resolution — what we know in the trade as a “mediator’s proposal.” If this does not do the trick, no deal is done.

Freund notes that the Getting to Yes crowd likes to probe beneath the parties’ positions to find “shared interests” to unlock a creative resolution. But he finds that the problem with that approach in one-shot squabbles over money is that when you look beneath the far-out dollar positions a party takes, all you find are other, somewhat more reasonable amounts of dollars. In other words, the real interests of business people in a dispute are just dollars. “It’s how the players keep score,” Freund writes. The warring parties in the dollar dispute send him the same strong message he heard from his former corporate clients: “Make this deal happen.”

The author is clearly a highly skilled, experienced and in-demand mediator. And while he eschews the style of back-and-forth proposals, his criticism is of a method that no skilled mediator would actually employ. What Freund does not do — and what no skilled mediator in this reviewer’s opinion ever does — is simply carry offers back and forth between the parties, offers that the mediator acknowledges the recipient will invariably find irrational and insulting. By avoiding exchanges of offers and counters, Freund avoids the problems of premature final offers, dangerous bluffs and unwarranted threats. But I believe that a mediator can serve as a negotiation coach. If one party wishes to make an insulting offer, a proficient mediator will either refuse to do so after indicating what the likely response will be or will reframe the offer in a way that will not cause the other party to slam a briefcase shut and walk out of the room. It is fair for the mediator to remind incendiary parties that they came to resolve a dispute, not to aggravate one.

The Put Case

Freund relays the story of “The Put Case” as an exemplar of mediation technique and negotiation strategy in the dollar dispute, and in this case the mediator does not clue the parties in to what an optimal “win-win” deal might finally look like. The “Put Case” described by Freund is a classic case full of ambiguities, differing definitions and shades of gray. It is ripe for tradeoffs and concessions, but Freund’s preferred approach is to negotiate only with the parties until the mediator comes upon the tradeoffs that might be most appealing to the parties.

His “Put Case” is a business buyout with lots of moving parts. It involves the minority-shareholder executive “putting” (selling, in the corporate context) his shares to the majority owner. The minority owner calculates his share price at $12 million; the majority owner calculates the price at $3 million. The parties, who do not trust each other and do not wish to continue their relationship, negotiate their range to $5 million to $9.5 million before reaching impasse. In the initial joint session, Freund tells the parties to put away the heavy artillery, drop the ad hominem attacks and put on their deal-making hats. The parties then separate, and Freund works with each to reach a level at which the dispute can feasibly be settled, without either knowing, until the end, just where his adversary stands. And should a party argue “principle in what is a case solely about principal,” Freund puts it snappily back on track. Having listened intently and questioned each side closely, Freund shares his opinion about the issues with each party. This is intended to have a moderating influence on the party’s attitudes because a neutral opinion carries weight with reasonable people who recognize they are not approaching the merits on a disinterested basis. Additionally, Freund observes that each disputant wants to appear reasonable to the mediator, and so he asks each party whether there are any particular issues on which each feels he is way off base. He then moderates his views in accordance with responses to any “hot-button” issues.

Freund then sends the parties to lunch and uses the time to work out a strategy to move the parties from seemingly irreconcilable positions to a mutually acceptable compromise, a number Freund believes both parties would rather shake hands on than go to court. But he does not propose a number that is too “pat” but rather a

Judith Meyer, who has served as a mediator and arbitrator for more than 20 years, resolves commercial mediations and arbitrations involving contract, environmental, employment, construction, tort and personal injury, professional liability, business and commercial, employment, environmental, intellectual property and insurance disputes. She teaches negotiation, mediation and arbitration at Cornell Law School. A graduate of Barnard College, she received her law degree from Cornell University Law School. She can be reached at judith@judithmeyer.com or www.judithmeyer.com.
fairly tight range that the parties can continue to adjust — a range that never has an extreme that is more favorable to a party than the mediator’s expectation of what ultimate settlement terms will be. Not expecting agreement with his proposal, Freund examines with each party where that party disagrees with Freund. Then he asks each party separately where he might be willing to settle the dollar dispute. If a number is unreasonable, he confronts the party with two real obstacles to eventual agreement: there is no chance of the other side accepting it, and since it ignores Freund’s neutral evaluation of the merits, Freund cannot put his weight behind pushing for a deal at that level.

When the pizza arrives at 7 pm and the mediation has produced little in the way of encouraging signs, Freund tells both sides (each unaware of the other’s current position), that while progress is being made, they are invited to break for the evening and return the next day. The next morning, the constructive mood of the first day does not survive the night, and, to get the parties pointed in the right direction, Freund offers a creative compromise that enlarges the pie. He suggests that a present deal be struck but that an additional amount be escrowed and paid out in a year, partially or fully, depending on an agreed source for deriving the price-earnings multiple of the stock at that time. I expect this scenario will resonate with many readers who have faced this choice between sending the parties home for a night’s sleep or forging ahead through the evening hours. Many capable mediators will serve the pizza, let the carbohydrates kick in, and forge on through the night.

I have mediated hundreds of commercial disputes over the years, and I admit to being slightly surprised at the control Freund takes over the mediation process. It may well be that parties come to him knowing he is an activist, judgmental mediator and understanding that they will know little about each other’s positions until a mediator’s PROD (Freund’s term for Proposed Resolution of a Dispute) is presented. Freund deliberately places this right to PROD in his mediation agreements. The agreement informs the parties that if one party rejects the PROD, that party will not know that the other party might have been willing to accept it.

What Freund keeps close to the vest other mediators accomplish by sharing information and tweaking shifting positions and points of view. It is possible to involve the parties in the mediator’s thought processes by guiding them through selective sharing of information on a path to what the mediator anticipates will be an ultimate — or close to ultimate — resolution. Rather than exciting hostility, defensiveness or miring parties further in opposing positions, a mediator can keep parties creatively engaged and give them a greater stake in the outcome by including them in the mediator’s thought processes. Parties accept solutions that they believe they came to on their own more eagerly than they do those suggested by someone else. Of course, the mediator’s role is to make the party believe that the optimal solution — the one gradually worked out by the mediator — is one that the party came to on his or her own. And if a party is wholly uncreative, the mediator will seek the party’s advice and input with nudging questions, questions designed to help the party cross the bridge the mediator is building. Freund sorts through the information gleaned in private caucus in his own mind to come up with the right solution for the parties’ problem. In keeping his thought process from the parties, he urges a far less transparent and far more judgmental role for the mediator. It is his style, and it may work for other mediators.

**Deal Dispute Mediating**

A good half of Freund’s book is devoted to deal-dispute mediating, where the parties are not arguing over past events but are locked in a dysfunctional and rapidly dissolving business relationship. Here his deal-making style differs from his activist judgmental approach in the one-shot dollar disputes, in that he does shuttle between the parties on the issues in dispute and shares information about movement from one side with the other. One of the things Freund also does in deal-dispute mediation (and this may be controversial) is to draft an agreement in principle for the parties to negotiate and ultimately sign. The standard training for mediators in most contexts is to broker an agreement for the parties but let them or their representatives write it up. The mediator who brokers a deal, prepares the agreement and forgets to put in a term one party or another imagined would be there sets himself up for potential malpractice by a party angry with her counsel, who then passes the buck to the mediator.

**Conclusion**

One of the great pleasures of Freund’s book is the detail with which he presents and drills down into his numerous hypotheticals. He is highly descriptive and highly analytical, and at times, reading this book is like looking at a made-for-TV movie script. Added delights are the unique cover and 11 interior illustrations by Freund’s long-time collaborator, Joe Azar, that put words into very funny pictures. And, as a pitch to advocates in mediation, Freund offers advice on representing a party in mediation, including insights for how to keep in-house counsel involved. For frosting on the cake, Freund even gives you the script for getting your client to mediate and for the opening statement to make after you have convinced your client to attend.

Readers may disagree with Freund’s style and approach to the dollar dispute, but mediators and advocates will gain insight into their own practices through the very detailed hypotheticals Freund dissects and the very cogent advice he offers mediators and advocates. ✦
Arbitration and the Constitution
An imaginative analysis from an uncharted perspective
Reviewed by John Wilkinson

In Arbitration and the Constitution, Peter B. Rutledge engages in a unique and fascinating analysis of the interrelationship between the US Constitution and arbitration. The topic is a timely one, since in recent years arbitration has increasingly been used in highly complex cases and in cases involving enforcement of individuals’ statutory rights. This increased use has heightened concerns about the need for arbitration to be fair and “get it right,” with the result that constitutional norms have worked their way into arbitration law, albeit in indirect fashion in many cases. Rutledge explains how arbitration, which was traditionally considered a purely private proceeding that operated outside the scope of the Constitution, has become subject to constitutional norms.

This review focuses on three of the areas that Rutledge singles out for analysis: arbitration and judicial review, arbitration and federalism, and arbitration and civil liberties.

Arbitration and Judicial Review
Rutledge starts with an analysis of arbitration in the context of judicial review. Because judicial review has provided a basis for arguments that arbitration (as a whole) is unconstitutional, this is perhaps the most important subject he addresses.

US Constitution, Article III
Rutledge starts by addressing whether Article III of the Constitution can be reconciled with arbitration. Article III, Section 1 of the US Constitution provides:

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

Opponents of arbitration have argued that the courts are only minimally involved in arbitration and that it is therefore in violation of Article III, Section 1’s requirement that “judicial power” be vested in the courts. The most common rebuttal to this argument is that by agreeing to arbitration, the parties have waived their rights to an Article III forum.1

John Wilkinson is Chair of the Dispute Resolution Section of the New York State Bar Association and has previously chaired that Section’s Arbitration and Mediation Committees. A member of the Board of Directors of the College of Commercial Arbitrators, he is a full-time arbitrator and mediator and serves on many of the American Arbitration Association’s panels of neutrals, including the Large Complex Case Panel. He has written and spoken extensively on the subject of arbitration. He can be reached at johnhwilkinson@msn.com.
In Rutledge’s view, the rights afforded by Article III, Section 1 are not personal and, thus, cannot be waived.

Given his rejection of the waiver theory, Rutledge then turns to whether there is another rationale for reconciling arbitration with Article III. After discussing many interesting approaches and theories, Rutledge concludes that compliance with Article III’s requirement of court involvement can best be measured through use of a flexible balancing test to determine whether necessary standards of judicial review have been satisfied. After weighing what he considers the key factors, Rutledge concludes that expansive judicial review is required for constitutional issues, but that less review is required for ordinary legal questions and even less for determinations of fact. He analyzes the extent of judicial review that is needed in particular types of arbitrations and concludes that existing norms of review in private commercial arbitration, NAFTA arbitration and investment arbitration are sufficient to comport with the requirements of Article III, Section 1.

**US Constitution, Appointments Clause**

Rutledge next focuses on whether arbitrators in certain contexts are “Officers of the United States” and therefore should be appointed by the president. The Appointments Clause in Article II of the Constitution provides that:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein provided for, and which shall be established by Law: but the Congress may by Law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of law, or in the Heads of Departments.

The primary issue Rutledge addresses in the context of the Appointments Clause is whether NAFTA arbitration panels include “Officers of the United States,” who must be appointed by the president, or whether such panelists are “inferior Officers,” who may be appointed by persons and entities other than the president. In the end, Rutledge concludes that such arbitrators are “inferior Officers” within the meaning of Article II and thus need not be appointed by the president. In support, Rutledge notes that NAFTA arbitrators have limited duration of service, limited duties and limited jurisdiction. But more important, Rutledge emphasizes that categorizing NAFTA arbitrators as “inferior Officers” is consistent with the basic reason for the existence of the Appointments Clause. More particularly, Rutledge reasons that: (i) “the core concern animating the Appointments Clause is the risk that one branch will exercise the appointments power in a manner to aggran-dize itself at the expense of another”; and (ii) “[n]othing in NAFTA’s scheme for naming arbitrators to binational panels runs afoul of this principle.”

**Arbitration and Federalism**

Rutledge effectively describes the bewildering tangle between the Federal Arbitration Act (FAA) and arbitration laws of the various states, addressing many complicated issues as to what law applies in what circumstances. In conducting the analysis, Rutledge directs his primary focus to the enforcement of arbitration agreements and the choice of law, both within the context of the Supremacy Clause. Article VI of the Constitution (Supremacy Clause) provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Since Article VI provides for the supremacy of federal law, there is necessarily tension at times between the Federal Arbitration Act and the arbitration statutes of the various states. Rutledge addresses some of the more important aspects of this tension in an engaging discussion that is briefly described below.

**Enforcement of Arbitration Agreements**

Section 2 of the FAA provides that arbitration agreements “shall be valid, irrevocable and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract.” This section is the subject of two critically important and seemingly conflicting decisions of the US Supreme Court that Rutledge discusses at length.

*Southland v. Keating*, 465 U.S. 1 (1984) involved a series of actions in California state court in which a group of convenience store franchisees claimed that the franchisor had violated both common law and the California franchise statute. While the franchise agreements contained arbitration clauses, the California franchise statute provided (to the contrary) that: (i) the California state courts had jurisdiction over claims arising under the statute; and (ii) any attempt to waive any of the statute’s provisions would be void.

In *Southland*, the Supreme Court held for the first time (and to the consternation of many) that Section 2 of the FAA applied in state court and, on that basis, the court went on to hold that Section 2 of the FAA preempted the contrary provision of the California franchise statute and that the claims therefore had to be arbitrated. In reaching this conclusion, the court clearly stated that arbitration clauses are subject to generally applicable contract defenses under state law but are not subject to state standards, such as those in the California franchise law.
statute, that single out or discriminate against arbitration agreements (compared to other garden-variety contracts).

After achieving slow and grudging acceptance, Southland hit a bump in the road in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). That case involved a challenge to a judicially created rule of California law whereby an arbitration clause coupled with a class action waiver was unconscionable and unenforceable. While this rule was part of California’s generally applicable law related to unconscionability of any and all contracts, the court nonetheless held that the FAA preempted the California rule and that the waiver was effective under federal law.

Rutledge points out that Concepcion turns a well-settled (if controversial) rule of law on its head. Prior to Concepcion, state law appeared to provide a safe harbor for state regulation of arbitration agreements so long as the regulation was generally applicable to all contracts. After Concepcion, the harbor clearly is no longer safe, although the bounds of the danger are, at best, unclear and confused. All that can be said is that Southland and Concepcion now exist side by side, leaving commentators with nothing but a guess as to where the tension between the two cases might ultimately take us.3

Choice of Law

Rutledge next considers the extent to which parties can reinvigorate state law through choice of law clauses requiring application of state law. Any analysis in this area turns on three seminal cases.

In Volt Information Services, Inc. v. Stanford University, 489 U.S. 468 (1989), there was an arbitration clause and a provision specifying applicability of California law. The California court held that the choice of law clause encompassed California arbitration law as well as substantive law and, on that basis, it upheld a stay of the arbitration that had been granted pursuant to California arbitration law. The US Supreme Court affirmed, holding that the California court’s interpretation of the choice of law clause was a matter of state law over which the Supreme Court had no jurisdiction; and (ii) the FAA did not preempt the stay of arbitration that had been imposed on the basis of California arbitration law.

After a discussion of many aspects of Volt, Rutledge turns to Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995), where the parties’ contract had an arbitration clause and a provision specifying that New York law was to govern. This raised an issue as to applicability of New York’s “Garrity” rule, which precluded arbitrators (but not courts) from awarding punitive damages.4 The US Supreme Court held that the choice of law clause encompassed only the “substantive principles that New York courts would apply” but not New York’s “special rules limiting the authority of arbitrators.” This meant that the New York choice of law clause did not incorporate the “Garrity” rule, even though the rule was part of New York’s arbitration law. At least on the surface, this holding is directly contrary to Volt, where the choice of law clause incorporated California’s arbitration law and its provision for a stay of arbitration that was enforced.

After a well-done discussion of the interrelationship and conflict between Volt and Mastrobuono, Rutledge turns to Preston v. Ferrer, 552 U.S. 346 (2008). That case pertained to a contract that contained an arbitration clause and a California choice of law provision. The issue was whether there had been a violation of California’s Talent Agencies Act, which provided that California’s labor commissioner (as opposed to an arbitrator) was authorized to make a preliminary determination as to any asserted violation of the act. The California courts held that the choice of law clause encompassed the statutory assignment of jurisdiction to the labor commissioner and, on that basis, they enjoined the arbitration. Without overruling Volt, the Supreme Court reversed, holding that the FAA preempted the California act’s provision for a decision by the labor commissioner and that the matter should be resolved by arbitration.

As Rutledge points out, Preston elevates the Volt/Mastrobuono conundrum to a whole new level. Before Preston, one might have tried to reconcile Volt and Mastrobuono on the grounds that Volt was based on deference to a state court’s construction of a choice of law clause whereas Mastrobuono required no such deference to a state court construction since Mastrobuono was completely grounded in the federal system. This mode of analysis, however, hits a dead end with Preston, since Preston and Volt reached conflicting results under circumstances where both cases were based on California’s construction of a choice of law clause.

While Rutledge does not resolve the conflicts and cross currents in the Volt/Mastrobuono/Preston trilogy (no one could), his discussion of this important area is interesting, thought-provoking and well worth reading.

Arbitration and Civil Liberties

Rutledge next focuses on the relationship between arbitration and civil liberties, noting that the topic has taken on enhanced importance ever since the Supreme Court permitted arbitration of statutory claims between companies and individuals in areas such as employment, consumer and securities. He initially discusses the possibility of applying the protections of the Constitution directly to arbitration. In the end, however, he concludes that this cannot be a fruitful approach because the requisite state action is simply not present in arbitration. Rutledge sees far greater possibilities in private protocols through which many due process norms have seeped into arbitration. After an engaging discussion of such protocols, Rutledge points to and discusses protections found in Article V(1)(b) of the New York Convention, as well as Section 10(a)(2) of the FAA, which authorizes
federal courts to vacate arbitration awards “where there was evident partiality or corruption in the arbitrators.” Rutledge then engages in a discussion of how some courts have construed language such as this as a basis for incorporating certain due process norms into arbitration.

**Conclusion**

In the end, there is no way this brief review can capture the depth and acuity of Rutledge’s analysis. While some of Rutledge’s discussion might be a bit difficult (but certainly not impossible) to follow and while some of the topics are not likely to be the focus of cutting-edge judicial decisions in the near future, the fact remains that Rutledge has succeeded in creating a thoughtful, imaginative and provocative analysis that leaves the reader with a good understanding of arbitration from an uncharted perspective.

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**Endnotes**

2. For related reasons, Rutledge also concludes that appointment of NAFTA arbitrators is not contrary to Article II, Section 3 of the US Constitution, which requires that the president “shall take Care that the Laws be faithfully executed . . .”
3. While the states may have little leeway to enact rules about enforcement of arbitration agreements, Rutledge points out that states have far more flexibility to adopt enforceable rules as to arbitration procedures. Rutledge suggests that this may be because arbitration procedure is far less important than enforcement of arbitration agreements. Based primarily on Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008), Rutledge also explains that grounds for vacating arbitration awards is an especially ripe area for states to address in their arbitration laws without fear of federal preemption.

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Submit a Proposal for the Section of Dispute Resolution 2014 Spring Conference in Miami

The ABA Section of Dispute Resolution Spring Conference Planning Committee is now accepting proposals for the 2014 Spring Conference. The **Deadline for Proposals is** September 6, 2013. The Conference will take place on April 2-5, 2014 at the Hyatt Regency Miami. We are seeking proposals for presentations for concurrent CLE sessions, Skills and Practice Development sessions, Symposium on ADR in the Courts sessions, sessions for the Legal Educators Colloquium, and sessions for the Saturday International ADR Workshop.

The Conference draws from varied and diverse groups including bar association members, national and international ADR practitioners and organizations, corporate leaders, federal and state government employees, judges, neutrals, court administrators, trainers, and academics.

To learn more, visit the Section of Dispute Resolution home page for a link to Conference Proposals: [www.americanbar.org/dispute](http://www.americanbar.org/dispute).
Editors’ note: With this interview, Dispute Resolution Magazine is launching a regular feature to introduce readers to people who have compelling insights into ADR.

Michael McIlwrath is associate general counsel, litigation, of GE Oil & Gas in Florence, Italy, where he has led the company’s global dispute resolution team since 1999. Michael is co-author, with John Savage, of International Arbitration and Mediation: A Practical Guide (Kluwer Law International, 2010), as well as a contributing editor to the Kluwer Arbitration Blog. Michael is a member of the board of directors and past chairman of the International Mediation Institute, a nonprofit based in the Netherlands that promotes quality, transparency and ethics in mediation, and is a member of the board of directors of the National Center for Science Education, in Oakland, California, a nonprofit organization that defends the teaching of science in public schools.

Q: Mike, your odyssey over the past 25 years has been quite a journey. Tell us about it.

A. Hah! No great master plan, that’s for sure. I grew up in Stockton, an agricultural city in northern California, and wanted to see the world. After graduating from college in 1985, I ended up in Palermo, teaching English, with a vague idea that I’d eventually return to the US to get a PhD in American studies. But Sicily was freeing itself from the Mafia and had this electricity and hope from the work of heroic prosecutors like Giovanni Falcone. I learned Italian while watching the famous Mafia trials from the stands of the “bunker courtroom.”

From there I moved to Florence and worked as a writer and editor for a few years, and then to the US to attend law school. During the summer after my first year of law school, I clerked at the DOJ. Because I could understand some Sicilian, they let me help on a letters rogatory Mafia trial. Three Italian judges spent two weeks in a high-security courtroom in Washington, DC, hearing testimony of informants in the federal witness protection program. Falcone had just been assassinated, and during the hearings news arrived that his colleague, Paolo Borsellino, had been killed by a bomb outside his home in Palermo. The Sicilian judges didn’t skip a beat. They went straight on with the hearings.

How can you not be inspired by people like that?

After law school, I ended up at Willkie Farr in New York, where I had the good fortune to do a lot of work for Mario Cuomo. One of the lessons of working for the governor was always to dig deep to understand the client’s business, so that whatever you do as a lawyer genuinely advances their interests. I think if you get that into your DNA as a litigator, you are bound to gravitate toward mediation eventually.

My leap back to Italy was unromantic. I got a call from a recruiter who was helping GE ramp up the legal team of a recent acquisition in Italy, and they needed a litigator. I’ve been here in Florence since January 1999.

Q: Please tell us a little about your company and the kind of conflicts that typically arise.

A. GE Oil & Gas is a global business with headquarters here in Florence. The head office, Nuovo Pignone, began as a foundry on the banks of the Arno river over 170 years ago. It eventually became a manufacturing arm of the ENI group, Italy’s state-owned energy giant, which sold it to GE in 1994 during a period of privatization.
Today, we are nearly a $20 billion a year division of GE and growing rapidly, providing highly engineered equipment and services to the oil and gas industry around the world. We’re building factories in Angola, expanding manufacturing in Brazil, opening a research center in Oklahoma and making some interesting acquisitions, most recently of Lufkin Industries.

In a business this large and globalized, very little is typical. The conflicts are literally all over the map, with resolution methods of all types: direct negotiations, court litigation and domestic and international mediation and arbitration.

Q. Despite a wide portfolio of diverse businesses, does GE have a systematic approach to conflict management?

A. Yes. Although the businesses range from healthcare and appliances to energy, transportation, banking and financial services, we all have a common focus on the cost of conflict, and we each have metrics that place value on resolving disputes early. We don’tmediate disputes because it gives us a warm and fuzzy feeling but because it makes us more competitive.

GE is at heart a technology company, so the litigators tend to share the culture of innovation and problem-solving. If you looked across the company at any given time, you’d find half a dozen or so attempts to use mediation in new ways, from labor cases in other countries to online resolution of small manufacturing disputes.

Q. How did your own interest in mediation develop?

A. To keep from drowning! When we first counted all of our pending litigations, the total was 143, and they were all over the world, and all types and sizes. It was impossible to stay on top of existing cases and give attention to the new ones that continued to arrive. Late one night at the office, I found materials created by GE’s corporate litigation team, at that time headed by Brackett Denniston, and there was a presentation by PD (Elpidio) Villarreal, a litigator in Fairfield, Connecticut.

It was all about measuring cost avoidance by resolving conflict early, with a strong emphasis on mediation. It was an epiphany. The ideas just made sense. The next morning I came in early and literally started implementing Early Dispute Resolution immediately.

In case any of your readers is unconvinced of the buzzword was globalization, which meant buying and selling in different countries. You could mitigate the risk of courts you did not like or did not know by including arbitration clauses in contracts.

Q. What was the most difficult challenge you faced as you implemented your EDR program at a former state-owned company?

A. What I did not expect, to be candid, was a fight from our own outside counsel. Karl Mackie (of CEDR) once told me the most common excuse for rejecting an offer to mediate is, “sounds like a good idea, just not for this case.” Karl was on the money. But this resistance also helped weed out our law firms. The ones that didn’t get with our program did not last.

Overcoming internal resistance was not difficult because this was something that had the support of Brackett, as well as my boss, our company general counsel. And very quickly we had the data, too.

By the end of the first year, our caseload was cut by half, and then halved again the following year. Our general counsel had these nice charts he could use to show our CEO the legal team’s financial contributions. The business teams began to seek us out as partners in achieving common goals.

Q. Is it more difficult to propose mediation in countries where it is not broadly used?

A. Mediation is always easy to propose; you just have to accept that a lot of offers will be rejected. The benefits may not be obvious to a party that has only one or two disputes or that manages conflict in an ad hoc fashion in a place where mediation is poorly understood. The consequences sometimes seem like they are lifted from Bleak House.

One of the cases we first tried to mediate was a litigation filed in 1998 in Bari, a southern Italian city where we have one of our factories. The plaintiff was a local construction company. Our outside counsel and I went to Bari to see if we could settle. The other side was emotional, and said they “didn’t want to show their cards” early. I suggested mediation.

They looked at me like I was from outer space. I awkwardly explained how a neutral third party could help us reach agreement. This just irritated the other side’s lawyer further. He dismissed me by saying, “We already have a neutral third party: the judge!”

The case is still pending, on appeal 14 years after they could have settled in mediation, or it should have been decided instead in arbitration. I’m not sure that will ever happen. Both the owner of the company and his lawyer passed away several years ago.

Q. What are some of the emerging issues internationally where ADR is used or needed?

A. When I joined the company in 1999, the industry buzzword was globalization, which meant buying and selling in different countries. You could mitigate the risk of courts you did not like or did not know by including arbitration clauses in contracts.
International arbitration has become so expensive that parties are adopting new strategies. Some increasingly employ Med-Arb clauses, using mediation to avoid the cost of arbitration. Others are avoiding arbitration altogether.

The more recent trend of localization makes it more difficult for companies to avoid foreign courts. When you have 500 or 1,000 or more employees and a network of suppliers in a country, you’re going to deal with the local courts whether you like it or not.

With localization, you face the same problems with access to justice as any other citizen of a country. That’s one reason GE has been supportive of initiatives that sponsor the growth of mediation around the world, like the International Mediation Institute.

Organizations like the World Bank and the IMF also see mediation as playing an important role in improving the business climate.

Q. We are experiencing rapid growth in the use of arbitration under investment treaties. What is GE’s perspective on this process?
A. For technology companies, arbitration can only be an option of last resort in disputes with government or state-owned entities. Yet settling is often impossible because officials lack empowerment. This is especially true where corruption is perceived to be a problem, and you face the bleak extremes of either starting an arbitration or walking away from a meritorious claim.

For example, we once had a dispute with a state-owned refinery over the cost of a bridge we had to build to transport our equipment to site. The general manager of the refinery told me that settlement was simply not possible, despite the merits of our claim, because he could later face a criminal investigation of whether he had accepted a bribe. By contrast, losing an arbitration would bring only minor criticism that he could manage.

This is why one innovation we could get behind is investment mediation, i.e., a transparent negotiation structure for companies and countries to work out their disputes. It was discussed a few years ago at a United Nations Conference on Trade and Development meeting, and an International Bar Association subcommittee issued Investor-State Mediation Rules last year. You would need mediators with a special set of skills, and the International Mediation Institute is developing criteria with this in mind. The idea seems promising and hopefully has a future.

Q. In your experience, how much, and how effectively, is ADR being embraced outside the US, and how good is mediation advocacy?
A. As you know, in North America there are many neutrals who are adept at both mediation and arbitration. In other places, arbitrators and mediators tend to be to distinct populations, and the acronym ADR refers only to mediation.

Globally, mediation is definitely growing, helped by the fact that international arbitration institutions now offer a mediation service, so parties can include seamless Med-Arb clauses in contracts.

Unfortunately, I’d say the quality of mediation advocacy, at least for commercial disputes, is not great anywhere. It’s a shame how often lawyers miss the opportunities, or even advise their clients against mediating. But I’m not sure how much advocacy matters if the mediator is competent, although mediator competency is another big variable.

I used to think a mediator could do no harm since the process is non-binding. I was wrong. There are many who call themselves mediators who really shouldn’t.

Q. Your job involves conflict resolution in legal systems around the world. What are the differences in culture and mediation styles that you see being used?
A. You know, I wish everyone had the chance to see mediators from different countries in action. That’s why I started doing podcasts for CPR [the International Institute for Conflict Prevention & Resolution], to share this privilege.

I’m going to go out on a limb and say that cultural differences pale in comparison with what great mediators seem to share: an ability to convey they understand the parties’ conflict and their interests. They are not overly protective of their appearance of neutrality. On the contrary, they’re firmly on the side of reality. This is especially relevant in cross-border disputes. The best mediators manage to transcend borders and cultures, because they are dealing with basic human nature.

Q. What do you look for when selecting mediators throughout the world?
A. Finding a good mediator is not difficult if the parties are all from London, Oslo or New York. The challenge is in places where mediation is not broadly adopted, or when the parties are from different countries.

Before IMI, it could be a real grab bag. Obviously, you want someone who has skills and experience as a mediator, but often all you had was a line on a candidate’s CV showing they had once taken a course on mediation.

Now that we have IMI it’s all much easier, with a database of hundreds of certified mediators from different countries. It is also used by arbitration institutions. Mediation institutions use a closed pool of mediators as a means of quality assurance; arbitration institutions do not have access to a closed pool and therefore have quality concerns when seeking a mediator. We’re also having more success getting disputes to mediation by letting the other side choose from IMI-listed profiles.
Q. Does knowledge of local law and custom matter when appointing a mediator for an international dispute?

A. I think it matters even less than in international arbitration, where parties, law and place of dispute resolution can all be different and arbitrators can be from still other countries. For a cross-border dispute you can choose among the world’s best mediators, and I have not seen a strong correlation between familiarity with local law and successful outcomes. We’ve had cases resolved with German and English mediators when all of the parties were from other countries, and other settlements where the mediator was the same nationality as one side.

Q. You have been active in promoting ADR around the world. You’re a board member of IMI, you do a podcast for CPR on international dispute resolution, you’ve written a book on international mediation and arbitration and you post regularly on the Kluwer Arbitration blog. Where do you find the time?

A. It’s impossible to answer this without being mindful of my interviewers, our commitment to ADR. We could spend all day talking about settlement techniques or dispute resolution methods of indigenous peoples around the world. Finding time isn’t a problem for something we feel passionate about. So I suppose what you are really asking is, why are people like us so passionate about dispute resolution?

I think the answer is simply that we want to leave the world a better place, with less damage from conflict. I hope changing the world doesn’t sound too pretentious. 

Newest releases from the Dispute Resolution Section

• Civic Fusion — Bringing together the forces of political debate, this book outlines civic fusion and the process of successful public policy mediation. To help mediators understand how powerful the tool of mediation is and help them reach their full potential, this guide outlines what civic fusion is and provides real world examples of cases with positive outcomes.

  Susan L. Podziba; 2012; Paperback; 400 pages; $59.95 Regular/$49.95 Dispute Resolution Members

• Psychosis for Lawyers — Lawyers who can harness the insights of psychology will be more effective interviewers and counselors. In addition, they can engage in more successful negotiations, conduct more efficient and useful discovery, better identify and avoid ethical problems, and be more productive and happier. This book introduces practicing lawyers and law students to some of the key insights offered by the field of psychology.

  Jennifer K. Robbenolt, Jean R. Sternlight; 2012; Paperback; 600 pages; $174.95 Regular/$144.95 Dispute Resolution Members

• Stories Mediators Tell — Explore inspirational stories on the art of mediation through this collection that offers first-hand accounts of the unpredictable and often dramatic nature of mediation. Seasoned mediators share inspirational stories and advice on how to handle different situations.

  Eric R. Galton, Lela P. Love; 2012; Paperback; 366 pages; $49.95 Regular/$34.95 Dispute Resolution Members

• Early Neutral Evaluation — Instructing lawyers, judges, and court room administrators how to perform effectively and responsibly as early neutral evaluators, this comprehensive guide is a road map through the entire early neutral evaluation (ENE) process.

  Wayne D. Brazil; 2012; Paperback; 200 pages; $49.95 Regular/$34.95 Dispute Resolution Members

Visit www.ShopABA.org to order today!
Full disclosure: I came close to embarrassing Wayne Brazil almost 30 years ago. I was following him to the podium at a symposium on the then-new topic of court-annexed mediation. Having started the mediation program for the US Court of Appeals for the Sixth Circuit a few years earlier and become a true believer, I had come to proselytize to what I expected to be a skeptical audience. Brazil gave such a deeply thoughtful and credible explanation of the merits of court mediation that as we passed on the dais, it took all my willpower not to grab and hug him.

Over the last three decades, few have given as much sincere thought to the merits, risks and best practices of court ADR, and even fewer have expressed those ideas with as much intellectual passion, thoroughness and clarity, as Wayne Brazil. This book is one more example.

Brazil ambitiously proposes this book for “lawyers, litigants, neutrals, judges, court program administrators, and public policy analysts” and, remarkably, offers real value to each. In 206 pages (with appendices), former magistrate-judge Brazil recounts the history of Early Neutral Evaluation (ENE) in the US District Court for the Northern District of California starting in the 1980s. He explains when and how litigants, lawyers and courts can maximize the opportunities offered by this unique ADR procedure. He offers advice, procedures and forms to evaluators, 15 specific “practice tips” to lawyers and practical advice to clients on how to use ENE to their full advantage. From blunt admonition for evaluators to follow the rules to nuanced observations on how they can win credibility with lawyers and reflect well on the integrity of the courts, no perspective is unaddressed.

Even the claim that Early Neutral Evaluation was “invented” by the Northern District of California, a claim this reviewer has grown accustomed to hearing about nearly all forms and aspects of ADR, is justified by the precise consideration Brazil gives to distinguishing the functions of ENE from those of mediation. Perhaps more exactly defined by rule than followed in practice, the rigorous segregation of the neutral’s roles as evaluator vs. mediator nobly aims to protect the values, improve the effectiveness and honor the promises of both ENE and mediation.

**ENE in the Northern District of California**

In a nutshell, ENE in the Northern District is presented as a confidential, informal procedure offered by the Court.
to civil litigants at no charge to assist them in reducing the time and cost of litigation. The procedure clarifies and focuses litigants’ issues, streamlines discovery and presentation of the case to the Court (if necessary), and rationally explores bases for settlement. A judge or volunteer lawyer with expertise in the subject matter of the dispute as well as training in both ENE and mediation typically serves as the neutral evaluator.

The procedure starts with a Pre-session Conference in which lead counsel and the evaluator review expectations, agree on the content of formal statements and the exchange of information, possibly to include more discovery, and set the ENE Session date.

The ENE Session is attended by counsel and clients and other critical stakeholders. Following the evaluator’s introductions, parties make uninterrupted substantive presentations of their disputed issues, arguments and evidence. Responsive presentations by the parties and clarifying questions by the evaluator follow until differences are clear and the most important disputed issues of fact and law are identified.

On the next step, Judge Brazil is emphatic: Following full explication of the issues and arguments, and before discussing the option of mediation, the evaluator "retreats to her private office to draft the evaluation." The parties can opt to have the evaluation presented on paper, read to the parties or withheld pending settlement discussions. However, the evaluation must be reduced to writing before any settlement talks begin. Brazil insists on fulfilling the Court’s promise to deliver an objective, reasoned opinion on the merits of the case and to maintain an intellectual honesty in the process by which that opinion is formed.

His insistence on reducing the evaluation to writing helps secure what can easily become a meandering boundary between ENE and mediation. Up to this point all presentations and inquiry have occurred with full transparency and no ex parte communications, and the neutral’s role has been limited strictly to clarifying the merits of the parties’ legal positions. More like an informal arbitration or mini-trial than a mediation, this ENE is a process in which lead counsel talk early about just what kind of evaluation will most benefit the parties.

It might focus, for example, on “individual claims or individual defenses, how a particular legal doctrine might be construed by the court and applied to the case at bar, the probative power of specified evidence, the relative credibility of competing percipient testimony, the jury appeal of the parties’ competing story lines, the relative strength of lines of reasoning by competing experts, or the range of value a jury might attach to general damages.”

The evaluation could assess judgment value (the likely amount of the judgment should one be rendered), or it could focus on settlement value (to include compromises based on estimates of likely success or failure of relevant issues, even those not included in the parties’ presentations). As always, Brazil proposes serving the needs of the parties, preserving intellectual integrity and maintaining transparency as the governing criteria for making these choices.

Once the opinion has been written, the parties are given the option of engaging in mediation. The parties in 60 percent of cases in the Northern District choose to do so. If any party elects to see the evaluation before mediation, it must be presented to all parties. If not, the evaluator holds the opinion without further modification and switches roles.

**Ethical Issues in Transition from Evaluation to Mediation**

This transition from evaluation to mediation poses several tricky ethical issues for Brazil. The ENE evaluator in the Northern District is prohibited from “…urging or encouraging or pressuring” parties to mediate. If the parties decide to mediate, the evaluator-turned-mediator must offer format options, including mediation with and without caucus. If the parties choose mediation prior to presentation of the evaluation, the neutral must serve in a purely facilitative role. As Judge Brazil explains,

She may offer no evaluative feedback and no analytical help, even indirectly — for example, in the way she reacts (verbally, by facial expression, or by body language) to things litigants say or do during the mediated process. She must take care not to betray her substantive views in the ways she poses questions, or even by encouraging parties to look more closely at particular evidence or issues.

Brazil views any hint of an opinion about settlement terms that might flow from the earlier ENE process as clearly improper and damaging to the integrity of the Court. Though there are few topics on which he expresses as strong an opinion, I had trouble understanding this particular ethical concern. I see how disclosing an
opinion formed from the ENE process to only one party in a caucus might be seen as a betrayal of the parties’ mutual agreement to waive presentation of the opinion until after settlement talks are finished. And certainly if the evaluator had any power to influence the outcome of the litigation, disclosure to only one party could create an advantage that would be clearly improper. An evaluator in the confidential process Brazil describes, however, has no more power than a traditional mediator to affect the case on its merits. Once the transition is made, why should the behavior of the evaluator-turned-mediator be any more ethically circumscribed than that of a traditional mediator who meets with parties in caucus where she gains insights, forms opinions and coaches the parties in negotiations? To exclude as unethical all hints of opinion as to the wisdom or merits of parties’ settlement positions in mediation is to limit important contributions mediators can make and that parties often want.

I assume the principal reason Brazil does not simply require that a different neutral conduct the mediation is the time and expense involved in bringing a new person up to speed. Some litigants might be less likely to choose mediation if it means starting over. Presumably, they could have chosen mediation to start with but preferred the more rigorous path of developing a detailed understanding of the legal merits of their case. Having once done so however, the advantages of sticking with the ENE evaluator include not just the confidence and credibility she has developed with the parties but her familiarity with the dynamics of the case, including the issues, arguments, evidence, and the merits thereof.

Brazil wisely counsels evaluators-turned-mediators to avoid becoming invested in their opinions. When parties feel a mediator has developed an ego investment in or has become an advocate for a particular position or outcome, the mediator’s perceived neutrality and in some cases effectiveness can be compromised. This can be hard to avoid if the parties chose to hear the evaluation before starting settlement talks. Neutrals need to be able to provide parties feedback on the wisdom or merits of the parties’ settlement positions. The pitfall for neutrals is considering their opinion as the “right” way that the dispute should be resolved. Neutrals need to resist the temptation to push the parties toward a settlement that mirrors the written opinion and instead allow the parties to use the neutrals’ feedback in a way to find their own resolution.

Judge Brazil tackles for the ENE evaluator another ethical dilemma that mediators have struggled with for decades: what to do with independent personal knowledge that could significantly affect the merits or likely outcome of the case. In a “Practice Tip,” he suggests to practitioners that they decide and communicate to the evaluator in advance what they want her to do if she thinks of a claim, defense, legal theory or pertinent case that neither party has raised. But what if there are no instructive directives from the parties or the sponsoring court? Again, Brazil distinguishes ENE from mediation in which parties expect leeway to find their own solutions. He advises that in the absence of prior instruction, reasonable party expectations, clear local culture or other contextual factors, evaluators are there to offer their expert opinions and would be shirking their responsibilities not to do so. His regard and expectations for this unique role are high. He notes this “quasi-judicial” role goes even farther than the role of a judge, since a trial judge isn’t expected to articulate the relative strengths and weaknesses of parties’ positions, how the plaintiff might meet his burden of proof if he explored additional sources of evidence, or how evidence might be presented more effectively. An evaluator, to fairly qualify an opinion based on tentative information, may have to do any or all those things.

The Value of ENE

I admit I have been somewhat skeptical of the viability of ENE as a productive form of ADR. On several occasions, while mediating with good lawyers in high-stakes cases with pivotal technical legal issues, I convinced the parties to invest in an outside expert opinion from someone whom all sides trusted and respected. In each case, the lawyer against whose side the expert opined could not let go of his convictions. In the end, they maintained their own opinions over the experts’ and would yield little. It eventually became my practice as a mediator, when counsel asked me to read their briefs and say what I thought of their case, to ask them first to consider honestly how their settlement position would be affected if I found particular arguments of their opponents persuasive. When pressed with specific scenarios, they almost always conceded their position would not change. What they really wanted was a credible opinion that agreed with theirs. Admittedly, the appellate context in which I worked may not offer a fair comparison, since by the appellate stage lawyers are more deeply steeped in their arguments and less likely to be influenced by others.

Despite the careful crafting, enumerated benefits and long history of ENE in the Northern District, like arbitration it has been surpassed in popularity there and throughout the country by mediation. Brazil discusses this candidly, suggesting that lawyers might pick mediation more often because it is familiar and more flexible or because it is “…visible, readily available, fashionable, and easy to sell to clients. Moreover, mediation appears to the superficial eye to be the least demanding, least
threatening, and most manageable or manipulable form of ADR.” Some, he suggests, might “…believe that it is easier to disguise a weaker case in mediation than in some other types of ADR. In sharp contrast,” he notes, “ENE, at least as it has evolved in the Northern District of California, is less flexible in form…and less amenable to adjustments to cater to the emotional, informational, or situational needs of litigants and lawyers.”

Brazil catalogues the problems ENE seeks to address and the benefits it offers over other ADR forms, particularly mediation. Real distinctions seem limited, however, due in part to the way most court mediation is practiced. First, court mediation typically occurs early in the case, so opportunities to assess and focus issues for discovery and briefing can save litigants time and money if they are so inclined. Also, clients in both programs can hear their beliefs and their lawyers’ arguments tested, and both programs, when initiated by the court, open settlement discussion without either party having to propose it first. Finally, purely facilitative mediation, in which the neutral gives no hint of personal opinion is, I believe, rare. Just as ENE evaluators end up offering to mediate, most mediators subtly or not so subtly end up offering agent-of-reality advice on the merits of legal arguments and the settlement positions they spawn. Nearly all court-based litigation mediators are lawyers, and most are very experienced ones. To expect any but the most disciplined neutrals to not offer what they think parties need to solve their problem, which sometimes includes a nudge toward a more realistic appraisal of their position, is probably unrealistic…and arguably unnecessary.

What ENE as Brazil describes it does uniquely offer, for those with the courage to invite it, is a competent, unambiguous, transparent, informed third-party opinion on the merits of whatever questions the parties submit. For parties whose goal is to reach for compromise solutions that fairly match the merits of their factual and legal positions and for lawyers who are confident they can address any weakness in the case that the process or the neutral might uncover, ENE can be an excellent tool.

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Save the Date!

11th Annual Advanced Mediation & Advocacy Skills Institute
November 21–22, 2013 | Omni Nashville Hotel | Nashville, TN

This two-day interactive institute features rare opportunities to learn from some of the leading mediators and mediation advocates in North America. Each panel provides an opportunity to learn from an expert mediator, high powered in-house counsel, and a skilled outside attorney. Each phase of the mediation process will be discussed, followed by small group discussions led by experts in the field. The opportunity for mediators and advocates to interact in small facilitated groups provides a unique environment to enhance your skill, knowledge and understanding of the mediation process.
Mediation Week is an initiative to celebrate mediation around the world as one of several appropriate dispute resolution processes, to educate lawyers, parties, public officials and the general public about mediation, and to continue to promote the use of mediation throughout the world.

The theme for this year’s ABA Mediation Week is “Making a World of Difference: Bridging Differences in Positions, Perspectives and People through Mediation.”

The Section has an electronic toolkit with program/activity planning guides, talking points, hand-outs, articles, and much more.

Interested in sponsoring a Mediation Week event? The Section has limited funds available to provide financial assistance to organizations sponsoring ABA Mediation Week activities. Funds are awarded on a first-come, first-served, as-needed grant basis. Deadline is September 9, 2013. Applications received after that date may receive any funding that may be remaining on a reduced rate.

The toolkit, financial assistance application and much more information are available at the Mediation Week web site: http://ambar.org/2013Mediationweek.
As Ellen Waldman notes in the forward of her book, Mediation Ethics: Cases and Commentaries, ethical decision-making is no easy matter. It often requires a difficult choice between competing interests. Unlike the law, which involves more concrete concepts, ethics are somewhat amorphous and often must be determined through the lens of experience and based on the context in which a particular situation arises.

Ethics in the context of mediation practice is particularly difficult. As Waldman notes, mediation is a multidisciplinary field with no specific entry qualification or exams and no regulatory body to oversee the field. Mediators approach their task of breaking impasse and resolving conflict using a variety of styles and approaches.

Mediation Ethics acknowledges these challenges and tackles the subject with a novel and practical approach. Waldman first sets the backdrop with an in-depth and informative discussion of the values, models and codes that are the base of any analysis of mediation ethics. She then presents real-world scenarios and calls upon commentators — all mediation specialists from across the globe — to offer analysis from their own diverse perspectives.

At the core of each analysis are three underlying values: disputant autonomy, procedural fairness and substantive fairness. Waldman gives a concise and pragmatic description of these values and then describes the broad national codes that govern mediator conduct.

The most widely known is the Model Standards of Conduct for Mediators, which was revised in 2005. As Waldman notes, “The Standards have assumed a Talmudic status in a field eager for direction. Like the Bible, Quran, or other holy texts, the Standards serve as the textual touchstone for virtually every argument regarding what mediation is or should be.” But they and most other specialized standards and codes that attempt to guide mediators are aspirational and do not have the force of law, a fact Waldman acknowledges and tackles head on.

Recognizing that divergent philosophies about mediation will undoubtedly shape an ethical analysis,
Waldman gives a brief overview of the multiple models of mediation and the distinctions between problem-solving and relationship-building approaches. In the problem-solving model, mediators are either evaluative or facilitative or sometimes move between the two approaches. In the relationship-building model, mediators take a transformative or narrative approach, in which the ultimate outcome of the mediation is less about settling a dispute than about affecting relational change and personal growth or helping the parties move past the dispute into a different view or narrative of the situation. Waldman encapsulates each approach and explains why mediators working within different frameworks might reach different conclusions or perhaps get to the same outcome by different analysis.

Once she has set the backdrop, Waldman presents a variety of hypotheticals and calls upon prominent mediators and scholars to discuss how they would deal with the situations. Each subsequent chapter starts with a discussion of the value implicated and the guidance provided by the Model Standards or other guidelines. An editor’s case is presented to illustrate the issue and then a more difficult scenario is presented. The commentators provide an in-depth and candid discussion of how they would approach the issue, and then Waldman summarizes, compares and contrasts their responses.

The first issue Waldman tackles is the subject of party autonomy and diminished capacity. She outlines the components of capacity to participate in a mediation (understanding, appreciation and communication) and whether accommodations might be sufficient to bolster capacity. She then presents a real-life scenario involving an elderly woman who lives alone in her own home whose health is declining and who is exhibiting mild signs of dementia. The woman’s daughter, with whom she is not close, files a petition for guardianship, which the woman opposes. At a court-ordered mediation, the daughter’s attorney challenges the woman’s capacity and asks the mediator to terminate the mediation and return the matter to court. What is the mediator to do?

Waldman suggests there are two main questions to answer: whether the woman has the capacity to participate and also whether she has the capacity to bind herself to a particular outcome. Waldman then takes the reader through an analysis of these issues, and concludes, “Only if the disputants lack the functional abilities to understand, appreciate, and communicate should we intervene and consider terminating or otherwise altering the course of the mediation.”

A more difficult scenario involves a developmentally disabled young man who plays football on the local high school team. He was held back in school several times, so when he is enrolled in the 10th grade, technically he is already an adult, which renders him ineligible to participate on his high school sports team. He and his coach have brought an action under the Americans with Disabilities Act against the state Department of Education to challenge that determination. There is evidence that the young man is ambivalent about playing football and might be unduly influenced by his coach, who has come to rely on him to score the winning touchdowns. On the other hand, the coach seems genuinely to care about the young man.

Carol Liebman and Mary Radford both provide thoughtful and insightful guidance as to how they would approach the issues, each inquiring whether the student has capacity to truly participate in the mediation and whether it would be fair to allow him to bind himself to an agreement. The commentators each take a pragmatic approach, with Liebman calling on her own personal experience to lean toward a finding that the young man does have the capacity to participate in the mediation. On the other hand, Radford has serious concerns but discusses practical ways to ameliorate them.

In the following chapters Waldman takes the reader through a variety of scenarios dealing with autonomy and emotions or power imbalance, tensions between disputant autonomy and substantive fairness, mediating with untruthful parties, confidentiality, conflicts of interest and mediating across multicultural barriers.

Art Hinshaw and Gregory Firestone discuss how mediation confidentiality may be at odds with duties to report suspected child abuse based on allegations made during a divorce mediation. Wayne Thorpe and Bruce Meyerson opine on a scenario where an attorney mediates a racial bias case against Company A and then that attorney’s partner is asked to represent a plaintiff in an age discrimination matter against the same company, presenting a potential conflict of interest. John Bickerman and Jeremy...
Lack grapple with issues that arise when a mediator realizes that a seemingly routine business dispute actually involves a failed drug deal, a scenario based on an actual mediation conducted by Julie McFarlane, who offers her own analysis of the issues.

How often do mediators lament that someone in the room is being untruthful, and the lies may lead to an unfair result? Dwight Golann and Melissa Brodrick address a particularly difficult scenario, raising questions such as “What should the mediator do when the quality of decision-making for one party in a mediation may be skewed by bad-faith, or even downright dishonest, behavior by the other party?” and “What is the role of the mediator in determining and acting on the truth?”

In an increasingly multicultural society, mediators must confront cultural differences that complicate mediation. “Whether your mediation practice takes you on a circuit of local postal codes or globe-trotting overseas, it is likely that you will find yourself mediating with parties from a different culture .... Occasionally ... the clash of cultures will lead to ethical conundrums.” To illustrate this, Carrie Menkel-Meadow and Harold Abramson address a divorce mediation involving an Iranian-American couple who follow Islamic law, which may lead to a result inconsistent with a likely outcome in the American court system. Both provide careful analysis but reach opposite conclusions about whether they would withdraw as mediators. As Waldman observes, “Although superficially it seems as if they went to the same movie theater but saw a different show,’ a closer look reveals their analyses to be more similar than initially apparent .... Each of these thoughtful mediator-scholars reaches a fork in the road where a singular path calls. In assessing the road to take and the road not taken, they are prodded by different visions of mediator autonomy in the process.”

Waldman also offers advice to ADR provider organizations, both public and private, that may encounter ethical tensions despite their best attempts to remain neutral. She recounts the history of the development of codes and standards for providers that, even though “lacking the force of law, their identification of ethical flashpoints reveals areas where ADR providers must exercise special care in the initiation, expansion, and modification of their programs.” Phyllis Bernard and Susan Yates analyze a court-connected mediation program for small claims matters, staffed by law students who have grown uncomfortable with recurring landlord-tenant matters where the endings are becoming predictable. Bernard and Yates discuss issues such as imbalance of power, right to self-determination and the usefulness of bringing together stakeholders such as community advocates, landlords and others to address the broader issues presented by zoning regulations and their impact on certain communities.

These are just a few of the scenarios presented, all of which address challenging situations mediators confront regularly in their practice. The collective wisdom of these experienced practitioners is rarely presented in a single place, and many mediators would feel very fortunate to be able to call upon the breadth and depth of talent represented by the commentators in this book. Any mediator faced with a difficult ethical inquiry or law school professor attempting to lead students to think broadly about ethical obligations in mediation will find Mediation Ethics: Cases and Commentaries an invaluable resource.

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Our 20th Anniversary: Building on the Past and Looking to the Future

By James J. Alfini

The Dispute Resolution Section celebrates its 20th anniversary this year. Although we are still among the youngest of the 30 ABA sections, divisions and forums, we are among the top third in membership, and the programming, diversity and attendance of our annual spring conference are the envy of many more established sections.

What accounts for this rapid growth and burgeoning interest? The answer is subject matter and people. Developing and exploring creative alternatives to resolving disputes has captured the imagination of the bench and bar during the latter part of the 20th century and into the 21st. The ADR field has also attracted people with vision and commitment to serve in leadership positions.

The Section can date its origins within the ABA to the mid-1970s, when ABA President Justin Stanley established a “Special Committee on the Resolution of Minor Disputes” chaired by Talbot “Sandy” D’Alemberte. Nancy Rogers credits the late Robert Raven, president of the ABA from 1988 to 1989, as the key force behind elevating “dispute resolution” to section status within the ABA.

The purpose of this article is not only to trace much of the Section’s history over the past 20 years but also to celebrate its successes and recognize many of those who contributed. I thank my fellow Section leaders who shared their thoughts for this article and also recognize the extraordinary contributions of ABA staff. We should also pause at the outset to remember the past chairs who are no longer with us: Robert Raven, Resa Harris and Ben Overton. Each made indelible contributions to the development of the Section.

Early on, the Section leadership realized that we had a membership that was very enthusiastic, quite diverse and deeply interested in participating in initiatives in ADR policy development, education and outreach. For example, we have the highest percentage of non-lawyer (associate) members of any ABA section, and we have worked hard over the years to ensure that our members who are not lawyers have had a voice and a seat at the table.

ADR Policy Development

The first major initiative completed by the Section of Dispute Resolution was the development of the Model Standards of Conduct for Mediators. Bob Coulson, then President of the American Arbitration Association (AAA) had proposed the idea to Sandy D’Alemberte as a joint project of the ABA and the AAA. Sandy referred it to the Standing Committee on Dispute Resolution, and Bob Raven asked me to organize the effort in light of my work on a similar project in Florida. We added the Society of Professionals in Dispute Resolution (SPIDR)
as a co-sponsoring organization, and each of the three organizations appointed two members to the drafting committee. Our work was completed in 1994, after we had achieved section status.

The Model Standards of Conduct for Mediators were later revised, in 2005, by representatives from the successor organizations (the ABA Section of Dispute Resolution, the AAA and the Association for Conflict Resolution). Both the 1994 and 2005 versions of the Model Standards have been influential in establishing ethical norms for mediators and have been widely adopted. They are currently used by the Section’s Committee on Mediator Ethical Guidance to formulate responses to mediators facing ethical dilemmas.

Another signal accomplishment of the Section was the Uniform Mediation Act. Endorsed by the ABA House of Delegates in 2002, the UMA was the first uniform act drafted jointly by the American Bar Association and the Uniform Law Commission. The drafting process was lengthy and sometimes contentious, but the committee members and reporters worked hard to reach out to various constituencies for input and make the process as transparent as possible.

Other important accomplishments with regard to ADR policies include the ABA House of Delegates adoption of the revised Code of Ethics for Commercial Arbitrators, Standards for the Establishment and Operations of Ombuds Offices and a resolution encouraging foreclosure mediation program initiatives.

The Section has also led the way in developing policy in two critical areas by adopting resolutions on the subjects of the unauthorized practice of law by mediators and good faith requirements for mediators and mediation advocates. Following a wave of unauthorized practice challenges against non-lawyer mediators, in 2002 the Section adopted a resolution on Mediation and the Unauthorized Practice of Law, which set forth certain principles that helped to put an end to the UPL claims, stating in particular that mediation is not the practice of law. Similarly, in 2004 the Section took the leadership role in adopting an influential resolution on the question of the extent to which courts should exercise their authority to sanction parties and their advocates for violating “good faith” requirements imposed by a court.

Education

Early on, the Section accepted responsibility and adopted a strong leadership role to educate all those interested and involved in the dispute resolution field. Through a wide variety of Section publications and educational programs, the Section has advanced theory and practice on the full range of dispute resolution alternatives.

The Section’s educational contributions to the field are perhaps best reflected by the sustained excellence of Dispute Resolution Magazine. Frank Sander and Nancy Rogers were willing to transfer their considerable talents from leading the predecessor Standing Committee to making the magazine a success. Frank, who chaired the magazine’s editorial board for two decades, has been succeeded by Josh Stulberg and Nancy Welsh and currently serves as Chair Emeritus. The editorial board’s efforts, combined with the superb editorial staff, have helped keep the Section at the center of the ADR map.

The Section’s annual spring conference has similarly kept the Section at center stage. At the first conference, held in Boston in 1999 during Pam Enslen’s term as Section chair, Section leaders were amazed to see 600 attendees. Pam had hoped for 300, and I thought we would be successful if we got more than 100. We have maintained high attendance levels at the conference every year since, in part because the conference has accommodated a wide variety of constituencies within the ADR world. As Susan Yates points out, our conference has created a “conference within a conference” for those involved with court ADR and has similarly accommodated academics with the Legal Educators Colloquium and, most recently, the International...
Workshop. The annual conference also hosts the final round of the National Representation in Mediation Competition, originated by Kimberlee Kovach and other Section leaders in the Section’s early years. The regional competitions now involve law student teams from almost half of the ABA-accredited law schools.

Augmenting the educational programs at the annual conference are the annual mediation and arbitration institutes as well as special programs organized and implemented by the Section’s CLE Committee. The Section now holds more than 200 hours of accredited CLE programs per year in a variety of different formats, from in-person conferences and skills-based trainings to teleconferences and break-out sessions at ABA meetings.

Outreach

With all these policy initiatives and educational programs have come valuable outreach activities. These include domestic outreach programs such as Mediation Week as well as international initiatives. The Section has also reached out to broaden the base of those involved in dispute resolution through its diversity initiatives and the creation of Section entities such as the Women in Dispute Resolution Task Force (WIDR).

Two of the most significant domestic outreach programs have been Mediation Week and the Task Force on Mediation Quality. Officially adopted during the chair year (2010-2011) of Wayne Thorpe, ABA Mediation Week has grown quickly, with more than 50 programs in 20 states and five foreign countries in 2012. Similarly, the Task Force on Mediation Quality put the Section in touch with the broader community by reaching out to ask consumers of our services what they want us to do (instead of providers just telling people what they need).

The Section was recognized for its commitment to diversity early on, when it received an Honorable Mention Award in 1995 from the ABA Commission of Minorities and Women. Beginning in 2001, the Section required a diversity statement for conference workshops and added a pre-conference forum on Expanding Opportunities for Women and Minorities in Dispute Resolution for its 2003 annual conference. In 2009, Dispute Resolution Magazine published a special issue, “Uncovering Race in Dispute Resolution,” edited by Marvin Johnson and Maria Volpe. Debbie Masucci recalls that the Task Force on Women in Dispute Resolution was established in the fall of 2011 during her Chair year.

Expanding its reach, in October 2008 the Section convened an International Mediation Leadership Summit at the Peace Palace in The Hague. Ninety leaders from 28 countries attended. Responding in part to criticism that Americans were imposing their models of mediation in foreign countries, the event was informally dubbed “America Listens.” Many current initiatives of the Section’s International Committee can trace their origins to the ideas and relationships that emerged from that Hague Summit.

Responding to traumatic events and developments during the past decade, the Section made a commitment,
with the leadership of Bruce Meyerson, to address one pressing issue by creating a Task Force on Civility to look at how the Section might help improve the tone of public discourse. With the assistance of many others, the Section was successful in calling upon the ABA House of Delegates in 2011 to pass a resolution challenging all lawyers to do something in their practice and community to improve civil discourse.

**Conclusion**

In two short decades, the Section of Dispute Resolution has had many extraordinary accomplishments. The Section has indeed listened to a variety of voices to be in the forefront of policy development and educational and outreach initiatives in the ADR field.

At the same time, many Section leaders who fit into the “lawyers-turned-neutrals” category credit the Section with offering them the support and inspiration necessary to start a risky new career trajectory. John Van Winkle, the second Section chair, recalled a conversation he had with Roger Fisher at a Section symposium in 1994. When Van Winkle asked Fisher what he thought might be the most significant impact as we embarked on concerted efforts to encourage the growth and spread of mediation and ADR, Fisher replied that he would not be surprised if the people most profoundly affected by mediation were the mediators themselves.

Looking to the future, the Section’s challenge will be not only to build on past successes but to continue to provide opportunities for the kind of personal and professional growth anticipated by Roger Fisher. I have no doubt that the current and future Section membership will be up to the task.

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**Nominations Sought for ABA Section of Dispute Resolution Awards**

The Section is seeking nominations for three important awards. The **John W. Cooley Lawyer as Problem Solver Award** recognizes individuals and organizations that use their problem-solving skills to forge creative solutions. The **Award for Outstanding Scholarly Work** honors individuals whose scholarship has significantly contributed to the dispute resolution field. The **D’Alemberte-Raven Award** recognizes outstanding service in dispute resolution. The deadline for nominations is Sept. 30th, 2013. More information about each award can be found by clicking on the relevant links or by visiting the Section’s Awards and Competitions page from the Section of Dispute Resolution web site: www.americanbar.org/dispute.
Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation and Decision Making

A welcome volume that is thorough, readable, entertaining and educational

Reviewed by Richard Birke

Starting with the Conclusion

Psychology for Lawyers is a great book. Whether you are a transactional lawyer, a litigator, a managing partner or a mediator, you owe it to yourself to buy it, read it and build its lessons into your practice. Authors Jennifer Robbenolt and Jean Sternlight have produced a book that is thorough and readable, based in theory yet imminently practical, and as entertaining as it is educational.

The book consists of 15 chapters. The first seven are a primer in psychology, the next seven apply psychology to legal practice and a concluding chapter helps the reader use psychology to achieve satisfaction as a lawyer and as a person. In a mere 460 pages, the authors bring lawyers a wealth of information. In my view, this is a clear best-in-class and a "must buy."

Now that the conclusion is all wrapped up, we can work our way back from the beginning. We’ll start with some history.

A Brief History of the Intersection of Law and Psychology

For most of history, the intersection between law and psychology has been dominated by a single question: whether a criminal defendant lacks the capacity to understand whether his actions are right or wrong. If Wikipedia is to be believed, “not guilty by reason of insanity” was argued in the time of Hammurabi.

In more modern times, criminal law continued to dominate the law-and-psychology discussion. In her aptly titled 1979 opus, “Eyewitness Identification,” psychologist Elizabeth Loftus showed that cross-racial identifications tended to be particularly unreliable and that eyewitness testimony was subject to the vagaries of human memory.

Even more recently, Loftus and other psychologists began to grapple with false, altered or implanted memories in cases involving allegations of sexual abuse.

While the intersection may have expanded, a mere smidgen of the law — that is, the criminal law — has enjoyed all the attention. And it still enjoys the lion’s share of attention by those who study the science of mind. The MacArthur Law and Neuroscience Project’s emphasis on free will and criminality is just one example of this continuing fascination.

For about the last three decades, law professors teaching negotiation have become aware of the relevance of cognitive and behavioral psychology to the practice of law. In the late 1980s, professor Robert Mnookin (then teaching...
at Stanford) brought psychologists Amos Tversky and Lee Ross together with economists, game theorists and lawyers to explore the intersections between legal negotiation and psychology. At least since 1991 (when I was enrolled in one of his classes) and probably long before, Harvard’s Roger Fisher designed modules in his negotiation courses in which psychologists would help guide a legal negotiator through the journey toward understanding interests.

In the past two decades, these collaborations between legal academics and psychologists have borne a great deal of scholarly fruit. Many terrific book chapters, articles and even the rare self-contained volume describe the various connections, overlaps and intersections of negotiation and psychology. The aforementioned Tversky and Ross each wrote important chapters in a book entitled “Barriers to Conflict Resolution.” Mnookin has written and spoken extensively about the topic of psychological barriers to conflict resolution. Shortly before his passing, Fisher wrote with Dan Shapiro about the role of emotions in negotiation. Russell Korobkin, Chris Guthrie, Jeff Rachlinski and many others (including myself and the authors of Psychology for Lawyers) have added articles about the importance of understanding the human component of negotiation and decisions, and in particular, the kinds of negotiations and choices that lawyers see in their work.

However, despite all this great progress in the field, until Robbenolt and Sternlight wrote the book that is the subject of this review, no one had captured all the essentials in a single volume. The closest thing is a well-regarded article in the Ohio State Journal of Dispute Resolution titled “Good Lawyers Should be Good Psychologists.” That article was written by — you guessed it — Robbenolt and Sternlight. Their new book is the full explanation. At the same time, the lessons inspire the reader to spot this psychological concept at work. So it is with the lawyer. The topics and the titles of Chapters One through Seven, in order, are:

- Perceiving and Understanding the World
- Memory
- Emotion
- Judgment Shortcuts
- Decision Making
- Persuasion and Social Influence
- Interpersonal Communication

This is a phenomenal 162 pages of material. Up until now, when laypeople wanted to learn about how the human mind can be tricked and misled, I (and others) would recommend Scott Plous’ The Psychology of Judgment and Decision Making as an introductory book. It was recommended to me in 1993, and I’ve recommended it dozens of times since. With all due respect to Professor Plous, I now will recommend the first seven chapters of Robbenolt and Sternlight’s book — especially to lawyers. The authors have packed more into their 162 pages than any other work I’ve seen, and it’s accessible (as the Plous book also is) and current (which the Plous book is not).

These seven chapters cover a wealth of material concisely. For example, Amos Tversky and Daniel Kahneman’s Nobel Prize-winning work, known as Prospect Theory, fills thousands of pages in a wide variety of prestigious journals of medicine, psychology, business and law (of course you remember this theory — losses hurt more than commensurate gains feel good; we are risk-seeking in the face of losses and risk-averse in the domain of gains — mostly; and whether something is a gain or a loss can be a cognitive illusion). But few lawyers in a busy practice have time to wade through all that literature and figure out how the theory applies to the cases sitting on their desks.

Robbenolt and Sternlight have synthesized all this into a three-and-a-half page summary that includes a quote from a Supreme Court Justice and good advice on how to spot this psychological concept at work. So it is with literally hundreds of psychological principles. Robbenolt and Sternlight have collected and distilled, organized and presented vast amounts of psychological source material in user-friendly chunks, in an accessible, user-friendly order.

Each lesson stands alone and does not require further explanation. At the same time, the lessons inspire the student to learn more. While the first seven chapters can stand on their own as a primer in the psychology

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Robbenolt and Sternlight wisely refrain from taking on the entire field of psychology and omit discussion of aspects of psychology that are not directly related to lawyering.

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Merely a Slice of the Psychological Pie

Psychology is a sprawling discipline, and the psychology section at any large bookstore (remember those?) might contain thousands of volumes. So in a mere 460 pages of text, Robbenolt and Sternlight wisely refrain from taking on the entire field of psychology and omit discussion of aspects of psychology that are not directly related to lawyering. For example, there is no discussion of developmental psychology, and neither Freud nor Jung makes an appearance in the book.

The first seven chapters are a primer on those aspects of psychology that apply to the common activities of the lawyer. The topics and the titles of Chapters One through Seven, in order, are:

- Perceiving and Understanding the World
- Memory
- Emotion
- Judgment Shortcuts
- Decision Making
- Persuasion and Social Influence
- Interpersonal Communication

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of decision-making and negotiation, they also serve
to arouse curiosity for the chapters that focus on
application.

The Relationship between Psychology and the
Everyday Practice of Law

The second seven chapters are the best how-to guide
I can imagine on the topic of applying psychology to
lawyering. The titles of chapters eight through 14 are:
• Justice
• Interviewing Clients and Witnesses
• Counseling Clients
• Negotiating and Mediating
• Discovery and Due Diligence
• Writing
• Ethics

In this longer section of
the book, the authors take
the basics and show lawyers
where to spot psychological
issues and how to deal
with them. Robbenolt and
Sternlight have turned psy-
chological phenomena into
action items for practicing
attorneys.

In the limited space in this review, I can’t explore all
the advice the authors provide. But here are a few tidbits:
• Under Interviewing and Counseling: “Offering a cli-
ent a cup of coffee or tea can help to create a feeling
of rapport” (as opposed to offering a cold beverage).
• Under Counseling Clients: “Asking questions can
be an effective strategy for conveying an unpleasant
assessment” (as opposed to making declaratory
statements).
• Under Negotiating and Mediating, there is advice
on offers — who should present the proposal and to
whom the offer should be conveyed.
• Under Conducting and Defending Depositions:
“[H]ave [your witness] repeat the questions out
loud before they are allowed to answer .... if they
can’t repeat it out loud, it’s hard to argue that they
have heard the question accurately.”

What Else Makes This Book Great?

The book is peppered with quotes, YouTube cites,
exercises and notes that reinforce the material and break the reading
up into manageable chunks. Everything,
from chapter headings to font choices (like italicizing
psychological terms of art), contributes to making the
book accessible as a reference guide while still maintain-
ing readability for the “cover-to-cover” set.

Each chapter ends with a short box entitled
“Summing It Up.” Devices like this make the book
easy to digest and provide a useful way to refresh one’s
memory when using the book as a reference guide. Each
may find reading this book to be like drinking from a fire
hose. There is so much information in such a small vol-
ume that readers new to the subject may become flooded
after a short immersion, unable to absorb more data. I
suggest that such readers proceed slowly and patiently,
approaching Psychology for Lawyers more like a reference
book than a novel.

Back to the Beginning

As I said at the top of this review, this is a great book.
I recommend it highly to lawyers and non-lawyers alike,
for those who already understand how to use psychology
in their legal practices and for those who aspire to learn.
But if my recommendation isn’t enough, let me try some
psychology.

Supplies are limited!
(see “Scarcity,” p. 129)....

Everyone loves this book!
(see “Social Proof,” p. 131)....

Miss this book and you’ll
be missing a huge chance
to improve your lawyering
(see “Framing,” p. 88)....

Highly recommended! ◆
She had me at the lead: “A lawyer finds it painful to watch his client jump off a cliff, relying upon flimsy wings and lucky winds.” Yes. How do we guide clients to safe ground?

Marjorie Corman Aaron synthesizes the large body of literature on communication, psychology and emotions, applies those lessons to tasks lawyers tackle to provide information and counseling to clients, and offers specific examples of effective ways to provide that counseling. Much of the book contains commonsense wisdom, but its strength lies in rooting that wisdom in science. By bringing the wisdom to a cognitive level, she helps practitioners apply the science creatively to client relations.

Aaron starts most chapters with a non-legal story, problem or analogy. She then draws a parallel to the legal counseling context before briefly covering the relevant “science,” often describing the first research in the area and then bringing it forward to the most current. In each chapter, Aaron suggests an approach to the client counseling challenge, explains why that approach works well and provides examples of both unskillful and skillful methods. Both new and experienced practitioners will want to read this excellent book.

Delivering Bad News

The first chapter, Bad News and the Fully Informed Client, provides especially helpful approaches to this fundamental counseling role. Surprisingly, no other author has identified the applicable theory and applied it to this particular — and common — challenge. A litigator may need to advise a client about the basis for a legal claim, the likelihood of prevailing on a motion or at trial, the value of a case, an adverse ruling by a judge, the defendant’s last low-ball settlement offer, or the denial of an appeal. In the transactional context, lawyers must advise their clients about regulatory limits, tax consequences, disclosure requirements, corporate ethics, labor and employment issues, environmental impacts, and contractual obligations. Yet law school professors and CLE instructors rarely teach these essential skills. They assume, it seems, that lawyers will intuitively know how to handle these difficult, often emotional situations.
Aaron notes that lawyers faced with delivering bad news or providing other client counseling have several goals in mind. They want to:

- Maintain the client’s feeling of connection to and trust in the lawyer;
- Reassure the client that despite the bad news, the lawyer remains loyal to the client and will continue to represent him or her in a zealous way;
- Preserve the client’s belief that the lawyer is competent and skillful in handling the legal matter;
- Ensure that the client fully understands the bad news or other development in the case;
- Help the client process the news and make the transition required to respond appropriately; and
- Preserve the attorney-client relationship, so that the lawyer can continue to help the client (and get paid)

In this chapter, Aaron emphasizes the need for congruency in our communications with clients — in our choice of venue, body language, voice tone, pitch, sentence pacing and facial expressions, as well as word choice and phrasing, emphasis, and organization of the presentation of the news. For instance, she notes, the science counsels against delivering bad news without sufficient gravitas (which perhaps explains why so many film scripts have the protagonist preface bad news by saying, “You will want to sit down for this”), using unfounded optimism in voice or facial expression, using euphemisms, weak adjectives or hedge words, or “burying the lead.” It counsels against smiling or nodding too frequently, speaking too quickly, or talking with a light or casual tone.

Aaron also tells us to consider the following when delivering bad news:

- Be prepared;
- Create a private, comfortable surrounding;
- Forecast the bad news at the beginning of the conversation without being too blunt;
- Deliver it without stalling in a direct and scrupulously accurate way, using simple, jargon-free language;
- Maintain a comfortable pace for the client, using long pauses and questions to help the client perceive, understand, absorb and synthesize the information; and
- Show patience, empathy and caring throughout the counseling session.

Managing Cognitive, Emotional, and Psychological Overload

Aaron also discusses the cognitive, emotional and psychological overload clients can face when we counsel them. How do we help clients manage that overload so they can make effective decisions based on a distortion-free understanding of our legal advice and conclusions?

Later chapters offer an extremely valuable synthesis of additional research on effective communication, along with practical applications of the science to counseling contexts familiar to all lawyers. In these chapters, Aaron:

- Identifies three basic problems in translating complex legal language, context, procedure and substantive concepts and notes that “[p]aradoxically . . . law school may graduate lawyers newly competent in law and newly incompetent at ensuring their clients are fully informed.”
- Recommends that lawyers avoid stylized language and phrasing and take care in using terms, such as “a reasonable person,” that hold different meanings for lawyers and laypersons.
- Recognizes that lawyers and clients may not share the same information about the workings of the legal system, the basic steps in the legal process or the culture of law practice.
- Warns lawyers to be aware of the myths clients may hold about the legal system or the power a lawsuit might confer on a client. Despite some clients’ hopes to the contrary, a lawsuit may not actually give a client complete vindication, destroy an opponent’s public image or otherwise inflict pain.
- Encourages lawyers to stay curious by asking the client about his or her past experience with the legal process; about the client’s understanding of the status of the lawsuit; about how much detail the client wants in any particular explanation of the status of the case; about the deeper meaning of the case to the client; or about why a client prefers a particular choice in the dispute.
- Reminds lawyers that legal disputes can hold profound meanings for clients, often creating strong tension between the client’s identity and values and the rational economic choices he or she might otherwise make. The client, for example, may see herself as a righteous crusader and the defendant as evil incarnate. Once this framing happens, a lawyer may need to offer alternative meanings to help the client move to resolution of the dispute.
- Urges lawyers to deeply understand the client’s business, concern or underlying problem so the lawyer knows which elements of the explanation may hold more meaning or relevance to the client.

Facing Our Own Fears

Aaron also asks lawyers to face our own fears about interacting with clients when they are feeling angry, sad, frustrated, fearful, powerless, alienated, shamed, disgusted or resistant. One chapter’s summary of the research on emotions and the neuroscience behind them will help lawyers manage their own emotions, as well as deal effectively

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with their clients’. She suggests using the lens of the “five core concerns” — offered by Roger Fisher and Daniel Shapiro in their book *Beyond Reason: Using Emotions as You Negotiate* — to evaluate client emotions, bolster clients during the counseling session and build positive emotions to strengthen the attorney-client relationship.

**Psychological Biases**

Finally, we know that clients (and their lawyers) will experience psychological biases that affect their ability to perceive facts and circumstances; analyze information and advice; predict the likely result of any specific action taken or choice made; and make decisions. One chapter of Aaron’s book provides a concise discussion of psychological biases, offers effective illustrations of them and suggests ways to counteract these biases in our counseling relationships.

For instance, naïve realism, egocentric bias and fundamental attribution error affect a client’s perception and memory. Naïve realism makes a client feel that his own perspective is particularly authentic or accurate and that other people will, or should, share that perspective if they are at all “attentive, rational, and objective perceivers of reality and open-minded seekers of truth.” Under its influence, a client will overestimate the degree to which other people share his or her perspective, assume that other people know more about the client’s circumstances than they do, and believe that others have made faulty and unreliable observations. Simply put, the bias makes it difficult for a client to stand in the other party’s shoes. Therefore, a client may be genuinely shocked when the opposing party describes a very different perception of an incident or event in a deposition or at trial.

Other biases can affect a client’s decision-making skills, including anchoring, status quo basis, loss aversion and reactive devaluation. For example, the concept of anchoring recognizes that initial numbers and positions tend to create a gravitational pull. Accordingly, a personal injury lawyer will “anchor high” in a negotiation by making a multi-million dollar opening demand because he expects that demand to pull the final settlement amount toward that higher number. Aaron therefore suggests that lawyers avoid creating unrealistic client expectations, avoid talking early about any potential dollar amounts recoverable at trial or in settlement, provide that information as a range of possible outcomes, rely on objective criteria to explain the range and help clients feel that compromises made away from the anchor are justified.

I have not seen a more efficient, abridged version of this material in any previous publication. (For lawyers wanting to delve into this area of human psychology in much greater detail, *Psychology for Lawyers*, the new book by Jennifer K. Robbenolt and Jean R. Sternlight, offers a comprehensive resource. See Richard Birke’s review on page 27 of this issue.)

**Opportunity for Reflection**

I practiced commercial litigation for 20 years before moving into mediation and then becoming a law professor. In nearly every chapter of *Client Science*, I found myself thinking back on a particular situation involving a client: the business owner wrongly accused of sexual harassment; the defrauded client who could not afford the discovery costs of proving the fraud; the patent owner facing a burdensome international arbitration; and the homeowner who protected his family during a tornado but faced an insurance company that refused to pay a claim recognizing the total loss of his home. I found myself reflecting on whether I had followed Aaron’s advice in delivering bad news and whether I could have done a much better job.

Aaron found inspiration for the book from at least two sources. First, she designed a client interviewing and counseling course at the University of Cincinnati College of Law that uses trained actors in the role of clients. Her book captures the observation of, reflections about and comments from participants in more than 700 simulated client-counseling sessions. Second, as a mediator, she has seen the effects of poor counseling offered by lawyers to resistant clients.

She concludes that the lawyer’s task does not begin or end with simply explaining developments in the case, legal information or legal advice in a way that makes sense to the lawyer. Instead, we need to explain it in a way that ensures that clients “get it, really get it.”

[The author] also asks lawyers to face our own fears about interacting with clients when they are feeling angry, sad, frustrated, fearful, powerless, alienated, shamed, disgusted or resistant.

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**CLIENT SCIENCE**

*Advised for Lawyers on Counseling Clients Through Bad News and Other Stages of the Conflict Cycle*
Book Reviews in Brief

By James Coben and Josh Stulberg

Online Dispute Resolution: Theory and Practice
A Treatise on Technology and Dispute Resolution
Mohamed S. Abdel Wahab, Ethan Katsh, and Daniel Rainey, Editors

Information and communication technologies (ICTs) are evolving at an ever-accelerating rate. Texting, email, web-based conferencing, electronic discussion groups and social networks facilitate instantaneous global communication on a scale never imagined just years ago. These communication tools, together with the rapid online interactions characterizing e-commerce, have created entire new universes for disputing and have inspired development of a plethora of creative technology-assisted dispute resolution processes.

For those interested in this new frontier (and perhaps more important, for all others in the dispute resolution business who should be), the editors of this comprehensive treatise have met their self-proclaimed objective to provide in-depth analysis and an overview of the past, present and future of online dispute resolution (ODR) — in their words, “a lens through which readers may observe and understand the issues facing dispute resolution practitioners as we struggle with how to integrate ODR and ICTs into ‘mainline’ dispute resolution theory and practice.”

With contributions from more than 30 of the world’s leading ODR experts, the treatise (24 chapters in all), provides a history, a grounding in theory, an overview of ODR schemes for e-Commerce transactions and succinct summaries of state-of-the-art practices, ranging from e-negotiation, e-mediation and e-arbitration systems to the interplay between ODR and mobile phones. The book makes the case for developing global ODR redress systems that take into account structural asymmetries in electronic transactions, and it explores future trends in consumer ODR as well as less commonly understood applications, including, for example, the role ODR may play to increase governmental transparency.

Chapter authors surface the critical role of culture, highlight the tremendous challenge of developing and maintaining interpersonal trust online and fully explain the critical interplay between ODR and online reputation systems. The treatise’s closing chapters map ODR developments on a global scale, with in-depth focus by region: North America, Europe, Australia, Asia, Latin America and Africa.

James Coben is a member and Josh Stulberg is Co-Chair of the Dispute Resolution Magazine editorial board. Coben is a professor at Hamline University School of Law and a senior fellow at Hamline’s Dispute Resolution Institute. He can be reached at jacoben@hamline.edu. Stulberg is the Michael E. Moritz Chair in Alternative Dispute Resolution at the Ohio State University Michael E. Moritz College of Law. He can be reached at stulberg.2@osu.edu.
To top it off, in celebration of last year’s Cyberweek, the book has been made available online for free. To view the clickable table of contents, visit http://www.objuds.org/odrbook/Table_of_Contents.htm.

Contemporary Issues in International Arbitration and Mediation
The Fordham Papers 2011
Arthur W. Rovine, Editor

This book of 26 essays, particularly those analyzing arbitration topics, inspires. The authors include problem-solving lawyers who sharply analyze strikingly complex practical matters and insightful scholars who analyze concrete challenges with a goal of making a difference.

Most of us do not practice in this setting — international commercial arbitration — but these experiences present challenges that teach all of us about the complexities in designing and sustaining a vibrant, effective and fair arbitration process.

Consider the following: a private company from Country A contracts with a government-owned company in Country B to deliver fuel. The defendant refuses to pay, claiming that the product delivered did not meet contractual specifications; the plaintiff demands arbitration, pursuant to contract, and claims $30 million damages.

What challenges might arise in conducting this arbitration? Some include topics that as law students we might have considered boring, but we would have been wrong to do so: they present vital issues. Consider just these two:

- **Joinder**: While practitioners support the idea that a claimant, at the onset of the arbitration, can amend an original demand in order to join additional parties, should the same right be accorded the respondent, even if the claimant disapproves? That violates the norm that arbitration is consensual, but precluding it might result in multiple arbitration cases (hence, inefficient) and risk multiple, inconsistent outcomes (hence, not fair). Which values trump?
- **Res judicata**: Can a losing party complain forever? In the international sphere, judicial tribunals in various countries with civil law or common law traditions bring different understandings to the triple-identity test used to proscribe further proceedings. Stated differently, the application of the test is not consistent. For example, res judicata applies to the “same party,” but are agents, representatives, principals and subsidiaries all the “same party”? Res judicata applies to decisions addressing matters arising from the identical transaction or causes of action, but there is no consensus among courts as to the meaning of those phrases — hence, the doctrine withers.

Without shared understandings on these and other matters, party confidence in the arbitration process — understandably — is not only shaken. In very concrete, tangible terms, the process becomes costly and unending.

These and other topics engage the reader. While some essays are more accessible to the reader than others, all merit attention.

Civic Fusion: Mediating Polarized Public Disputes
Susan L. Podziba

Some people believe that significant conflicts that permeate our national life are intractable. Not, fortunately, Susan Podziba — and skilled interveners like her. In this important book, Podziba draws on her remarkable skills to map out intervener responsibilities and strategies for mediating polarizing public disputes. Her goal is to help disparate, passionate parties do more than engage in a public conversation; it is to help them negotiate actionable agreements.

Podziba examines three cases from her own mediating experience to illustrate the possibilities of civic fusion: “Bringing diverse, politically active people close enough together, under particular conditions… [to] help [them] bond.” One case, the Chelsea Charter Consensus, started because a state government placed a city into receivership following years of what the state described as local fiscal mismanagement. As the receivership period moved toward closure, the challenge was whether citizens could create an acceptable charter to govern its civic action. What was required, in short, was a constitutional convention in modern dress, and Podziba and her partner, with the creative use of current technology, helped make that happen in a stunningly broad-based manner.

A second challenge involved business people, union members, government officials and industry personnel who were all deeply concerned about outdated safety standards governing modern cranes and derricks but unable to agree on how to adapt them to current technology. Podziba and her associate facilitated a “reg-neg” process involving 23 talented, knowledgeable parties meeting 11 times for 31 days over a one-year period; their effort resulted in a consensus-adopted set of federal regulations that all viewed as efficient, effective and informed.

And in a poignant description of efforts fueled by personal commitment and engagement, she describes her collaboration with Laura Chasin to promote sustained conversation among six remarkable women — evenly divided among pro-life and pro-choice commitments — for almost six years that led to a consensus-adopted article appearing in the Boston Globe.

These experiences reveal that there is an identifiable set of intervenor questions for these challenges: who is a stakeholder? How are the stakeholders identified and selected? What procedural protocols are relevant? How do mediation principles such as process confidentiality balance with the intervenor’s task of summarizing and disseminating meeting summaries to parties and the
public’s right to know? Who funds such efforts? Is media-
tor neutrality a necessary feature for effective service? 
What forms of “actionable agreements” are possible?
What constitutes “success?” With this book, as with its 
important historical predecessor, Managing Public Disputes 
by Susan L. Carpenter and W.J.D. Kennedy, interveners 
have effective materials to guide their conduct in such 
situations. There are topics to address and tasks to per-
form. An intervener can perform them well or ineptly. 
Civic Fusion contains important general lessons for 
dispute resolution participants: We have reason to have 
confidence in a decision-making process that actively 
engages those who must live with the outcomes; people 
of deep conviction in opposition to each other can find 
a way to fuse rather than destroy; “process knowledge” is 
a necessary mediator skill but definitively not a sufficient 
condition for effectively helping disputants address 
complex technical, financial and normative matters. 
Americans are often accused of being naïve optimists 
who believe that all challenges are solvable. Podziba, 
gratefully, makes a compelling case for being optimistic. 

**Context and Pretext in Conflict Resolution:** 
*Culture, Identity, Power, and Practice*  
Kevin Avruch

This collection of essays by one of world’s most impor-
tant scholars on the intersection of culture and conflict 
resolution makes a compelling case that understanding 
the concept of culture is a prerequisite for effective 
conflict analysis and resolution. 

Like many great works, this one begins with a story, 
a 2007 account by the Washington Post commemorating 
the 1982 crash of an Air Florida Boeing 737 into the 
icy Potomac River just after takeoff from Washington’s 
National Airport. Avruch uses the story to illustrate the 
ubiquity of culture, through its description of dysfunc-
tional authoritarian cockpit culture, the evolution of 
cockpit culture after implementation of post-crash safety 
reforms and the explicit connection between culture and 
interpersonal communication. In sum, Avruch notes, cul-
ture “connects to communication, to power or authority, 
to norms and values and is susceptible to change.”

That said, “the mere existence of cultural differences 
is usually not the primary cause of conflict between 
groups,” writes Avruch, “however, culture is always 
the lens through which differences are refracted and 
cflict pursued.” It is culture, after all, that provides 
individuals with “cognitive and affective frameworks, 
including images, encodings, metaphors and schemas, 
for interpreting the behavior and motives of others.” In 
a wonderfully succinct list at the end of his introductory 
chapter, Avruch summarizes the additional main ideas 
behind the concept of culture as follows:

- Cultures do not possess agency; individuals do
- Cultures are not things, but analytical categories
- Individuals are bearers of multiple cultures, not a 
single one
- Individuals acquire their cultures as part of an 
going social life; they are not paternally deep 
coded in the gene or volksgeist
- Cultures are passed down to individuals, and in 
this sense one may speak of traditions; but cultures, 
as acquired by individuals throughout their lives, 
are also emergent and responsive to environmental 
or situational exigencies
- Cultures are not monolithic, integrated, and 
stable holes, but are fragmented, contestable, 
and contested

In other words: context matters! The balance of the 
book fully explores these themes, with special emphasis 
on authority and power in conflict resolution. The latter 
has been a particularly vexing problem, Avruch asserts, 
because our field’s traditional practices, beginning with 
its game theory foundations, “presume an essential sym-
metry of the contestants in a world where power is mostly 
distributed unevenly.”

As historian, Avruch documents the virtual absence 
of culture as a subject from the first generation of conflict 
resolution literature as well as it being outside the ken of 
early practitioners, who blindly endorsed a “have process, 
will travel” universality. As anthropologist, sociologist 
and political scientist, Avruch systematically catalogs and 
explains the competing theories underlying our practices, 
surfaces the many unresolved debates and neatly summa-
ries the academic critiques of culture from the left and 
the right. The reference list alone is a gold mine for any-
one seeking an entry point for truly reflective practice. 

And what about pretext? Our prefessed purposes for 
doing this work, Avruch asserts, are at the heart of how 
we conceptualize and deploy power as interveners. No 
serious work can be done, he reasons, to improve conflict 
interactions unless we first raise ethical questions: 

improve for whom, in the sense of what?
In 1988, Florida and Texas became the first states to adopt legislation that authorized trial judges to order any civil case to mediation, subject to very few restrictions and limitations. After years of experimentation with the use of alternative dispute mechanisms in a variety of contexts, a new era had begun. Over the past 25 years, court-connected mediation has grown exponentially. Starting with the early experimental days, mediation’s potential was great. It would enhance self-determination and mutual problem-solving, and it would be less costly and quicker than traditional adjudicatory processes. Mediation would provide a more humane process, one in which parties could be heard, maintain their dignity and make their own decisions.

In the past two and a half decades, court-connected mediation has encountered a range of critics. Many of the promises described above were not specific to court-connected mediation; in fact, the advent of court-ordered mediation led many scholars to question whether mediation’s full potential could ever be realized in a court setting, where efficiency interests would likely prevail. Would litigation become more humane, or would mediation become more like adjudication?

Many observers have also wondered about the impact of these processes on minorities. While questions remain about the pros and cons of court-ordered mediation generally, the focus of this article will be an exploration of whether progress has been made in the last 25 years regarding minorities’ experience, as both mediators and parties, in court-connected mediation.

Minority Mediators

The modern court-connected mediation movement can trace its roots to community mediation. One impetus behind the growth of community mediation was the belief that the traditional criminal justice system was insensitive to the conflicts facing minorities. At the time many of the first community programs were founded, the vast majority of judges, lawyers and court personnel were Caucasian, making the system a less than friendly place for members of minority groups to resolve their conflicts. In addition, the traditional system lacked the time, resources, expertise or inclination to address issues that might be specific to such conflicts.

Against this backdrop, community mediation began with a strong commitment to employing racially diverse personnel and volunteer mediators. The model of recruiting and training people from the community, people who looked like their neighbors and could understand local conflicts, led to a system in which program administrators and mediators often reflected the racial and ethnic diversity of the people they served. As they experimented with ways to provide value to their communities, these programs also were among the first to accept court-connected civil cases.
Over the years, court-connected mediation matured and evolved from primarily criminal justice system alternative or diversion programs to an avenue for addressing civil matters. In addition to the shift from quasi-criminal to civil cases, programs saw the amounts in disputes considered appropriate for mediation increase dramatically, from those in “minor” disputes to no upward dollar limit. These changes were accompanied by an increased professionalization of the field and an expectation among many, if not most, that mediators would be compensated.

As the court-connected programs expanded in their breadth and depth, the commitment to mediator diversity waned. The qualifications for mediators, particularly for complex cases, were often tied to professional licensure or prior judicial experience; given that the legal profession is not yet ethnically and racially representative of the population (and only now becoming closer to representing gender equality), it is no surprise that these qualifications had the unintended consequences of wiping out much of the mediator diversity in the field. This problem persists even as various organizations have attempted to address it because attorneys (not the parties) typically select the mediator and the mediators with the most experience are disproportionally Caucasian, male and older than the population. Community mediation programs, which rely on volunteers, continue to have the most diverse pool of mediators, but they have been overshadowed by the “professionalization” of the field.

**Minorities as Parties to Mediation**

In addition to asking questions about the diminishing diversity among practitioners, critics have raised concerns about minorities’ experience as parties in mediation, focusing on four basic areas:

**Quantitatively Inferior Results for Minorities**

A New Mexico study done in the early 1990s is one of the few empirical research projects designed to investigate how minorities perform in mediation. In this study, which involved “Hispanos,” people descended from the Spanish colonials who lived in New Mexico before the annexation of that area by the United States in 1848, the quantitative data uncovered the following:

- Minority claimants consistently received less money and minority respondents consistently paid more than non-minorities. This was true for both adjudication and mediation; however, the result was more pronounced for mediated cases than adjudicated cases.

- In adjudication, monetary outcomes were primarily related to case characteristics (e.g., whether the claimant was a lawyer or was represented by one).

- In mediation, ethnicity remained a significant predictor of monetary outcome but the effect was eliminated when both of the co-mediators were minorities.

This data is especially important because the empirical study was designed specifically to assess court-connected mediation. In addition to the findings listed above, the data revealed the following:

- Overall, parties who were sued and went to mediation were more satisfied with the outcome in mediation than in adjudication.

- Overall, claimants in adjudication and mediation were equally satisfied procedurally but claimants in mediation reported the outcome as fairer and less biased than claimants in adjudication. In fact, minority claimants and respondents were consistently more positive about mediation than they were about adjudication on all satisfaction and fairness measures — despite achieving lower monetary awards as claimants and paying more as respondents in mediation.

This study highlights that there are other possible measures of satisfaction rather than just how much money exchanges hands, including issues of relationships, respect and morality — things that rarely are valued in a traditional court setting. Another possibility is that it reflects parties’ interest in receiving procedural justice — specifically that the procedures by which decisions are made are fair and that the parties feel they have been treated with respect and dignity. While procedural justice is an important value of the traditional adjudicatory system, absent sufficient time and resources, parties often feel that they have not been given sufficient voice or received serious consideration in traditional court settings — particularly in small claims court, where this New Mexico study took place. A good mediation process can provide the kind of procedural justice that the parties crave.

**More Intrusive**

The concerns that informal dispute resolution processes are inappropriately intrusive as compared to litigation were best articulated by Richard Abel and Sharon Press is Professor of Law and Director of the Dispute Resolution Institute at Hamline University. Previously, she served for 18 years as director of the Florida Dispute Resolution Center, where she was responsible for the ADR programs associated with the state courts. She can be reached at spress01@hamline.edu.
Richard Hofrichter in the early 1980s. Their concerns were two-fold: disputes that were traditionally resolved (or not) within the community were brought within the realm of “state control” via their inclusion in community mediation centers, and the issues discussed in these disputes were expanded as participants were invited to air their feelings and reveal details about their personal lives.

In the context of court-connected mediation, the notion that a dispute that was not previously under “state control” now is under such control does not apply because by definition, the dispute has already been brought to the court’s attention. Further, it is not clear whether the concerns about an expanded view of the issues applies to court-connected mediation, given that depending on the orientation of the mediator, the process may in fact be limited to the four corners of the legal dispute.

But even if one accepts that in some court-connected mediations the mediator will encourage an expansion beyond the legal issues to give voice to emotion and personal impact, one has to question whether this really is problematic. Many people, in fact, believe that such an expansion is a good thing and that mediation is not fulfilling its true potential if parties are limited to discussing legal issues. In the context of minority populations, this may be even more important.

Most people would agree that today’s dominant US culture is highly individualistic with a short-term focus. For those who are more collective in their world view and more comfortable considering long-term implications, having a forum in which they are invited to consider and express the broad implications of a dispute would be both more comfortable and appropriate. The New Mexico study described above appears to support that an expanded discussion of issues may indeed be viewed by minorities as a net positive.

Mediator Neutrality Not Attainable, and Even if Attained, Problematic for Minorities

An additional critique focuses on the concept of neutrality. There are two facets to this critique — the first is that neutrality is not attainable. According to this view, the assumption that mediator neutrality can be achieved misses the reality that mediators bring to the table their own “social class, ethnic heritage and professional and political ideologies.”

The second facet is that even if a mediator could behave in a neutral manner, neutrality in mediation is problematic for minorities because mediator neutrality perpetuates “patterns of disparate treatment, experience, and outcomes” and acts as a “conduit for legitimizing power structures” that favor the dominant population.

The Model Standards of Conduct for Mediators adopted by the American Bar Association, the American Arbitration Association and the Association for Conflict Resolution in 2005 specifically address neutrality issues in the following ways:

- **Standard II B 1 Impartiality** — “A mediator should not act with partiality or prejudice based on any participants’ personal characteristics, background, values and beliefs…”
- **Standard IV A Competence** — “cultural understandings” is specifically identified as what is “often necessary for mediator competence.”
- **Standard IX Advancement of Mediation Practice** — encourages mediator to “act in a manner that advances the practice of mediation” and the first item on the list of ways a mediator may do so is by “fostering diversity in the field of mediation.”

The more relevant response to the first prong of this critique is to affirm that we have too few qualified mediators who represent the diversity of our communities — whether they are neighborhoods, families, schools, workplaces or nations. In other words, it is our responsibility to implement, and encourage the implementation of, the aspirational words of Standard IX. A diverse pool of mediators will prevent minorities from being at a disadvantage at a mediation by ensuring there are options for mediator selection that better represent the social identities, experience and worldviews of all of the parties involved. This phenomenon is highlighted in the New Mexico study, which found that the ethnicity of the parties was a predictor of the monetary outcome in mediation except when the co-mediators were also minorities.

In response to the second prong of the neutrality critique, additional research is needed to determine both the validity of this assertion and how we think about what it means to be neutral. For example, I believe that by structuring a process so that all parties have an opportunity to give voice to their concerns, the mediator supports neutrality and does not violate that concept. As the field matures, these types of discussions are critical.
Social Change Inhibited

The final critique contends that mediation’s focus on the future and on shifting parties from assessing blame for past “wrongs” inhibits social change. In addition, if cases are resolved short of trial, there will be limited ability to set or revisit precedents. A corollary to this concern is that by emphasizing cooperation, mediation denies the existence of some conflicts and transforms others into “simple misunderstandings.” This critique concludes that the more relational (collectivist) party will be disadvantaged in mediation as a result.

When one compares the mediation process to the traditional adjudicatory process, this critique loses some of its persuasiveness. Given that upwards of 96% to 98% of all cases filed are not resolved through a trial, it would be more accurate to compare court-connected mediation to settlement. When parties are represented, settlement discussions typically take place between the attorneys; often the named parties are not involved until there is a settlement offer to accept or reject. It is hard to imagine how that process is fulfilling to any party, especially someone who is collectivist or relational in thinking. Today, a more accurate critique would be to focus on how we can improve both the traditional adjudicatory system and the court-connected mediation process to provide voice for those who generally are not heard. Shifting from making referrals to mediation mandatory to making those referrals voluntary or making mediation mandatory only upon request of the plaintiff would also remove much of the heat behind this critique, because it is hard to argue against individuals being able to decide how they wish to resolve their concerns.

Recommendations

After 25 years of court-connected mediation experience and research, we have identified areas of concern. It is now time to implement changes to improve the next 25 years for minority mediators and parties.

Data Collection, Research and Evaluation

Albert Einstein is often credited as saying: “Not everything that counts can be counted and not everything that can be counted counts.” This certainly holds true in the context of mediation. Satisfaction and impact on relationships are difficult to assess and therefore count, but they are critically important measures. On the other hand, the number of mediations that result in settlement is easy to count but does not provide an accurate picture of whether procedural justice was achieved.

As advocates for mediation, we have a responsibility to see that both the traditional adjudicatory process and the mediation process are as strong and respectful as they can be. We should work for adequate funding for both processes and for adequate funding to conduct research and evaluations. Comparisons should be made between what actually happens in the traditional processes and in mediation, not merely the idealized or flawed versions of either.

In particular we should determine whether the results of the 1990-1991 New Mexico study are replicable involving other minority populations today. Minority populations are not all the same, but do their differences yield different results? The study also used small claims cases as the data source. Would the results be the same in family cases or large civil cases? Professional associations should be doing more to encourage research in this area, including research grants and task force projects.

Increase Mediator Diversity

The New Mexico study, as well as other small studies and a great deal of anecdotal evidence, suggest that the ethnic identity of the mediator matters. This, in combination with the shift away from minority mediators in court-connected programs, highlights an area where changes are necessary.

The Florida Supreme Court took a step toward addressing mediator diversity in 2007, when it removed the requirement that complex civil case mediators be Florida attorneys who have at least five years of practice or retired judges from any US jurisdiction. While this modification was an important symbolic step, the bulk of civil mediations are still mediated by male Caucasian attorneys. As long as attorneys continue to choose the mediator for their cases, they will continue to select from the more limited pool of experienced, non-diverse mediators. To effectuate a real change would require more dramatic rule revisions that have the potential of interfering with the important concept of self-determination.

Professional associations and private providers of dispute resolution services should devote resources to operationalizing Model Standard for Mediators IX, and there must be a plan to develop meaningful opportunities for mediators who come from diverse backgrounds.

Training

Much can be accomplished through both formal and informal training opportunities. Many court-connected programs require that their mediators complete initial training. At a minimum, this training should include learning objectives that relate to cultural competence.
and encourage consideration of the issues raised in this article. Continuing education programs for mediators should also highlight diversity and cultural competence, so that as mediators become more experienced, they continue to consider these issues. In addition to these more formal training opportunities, court-connected programs should encourage informal interaction between mediators in the form of discussion groups and luncheons. Particularly if a program is successful in diversifying its ranks, these types of experiences will go a long way to educate mediators.

**Access to Information**

Program administrators and mediators need to be mindful of what information is shared about the mediation process and procedures and how that information is shared. For example, in what languages is information about the process and procedure available to participants — and at what comprehension level? How is the information distributed? Is the information merely provided online or is there a knowledgeable person available to talk to participants? Is there clear information provided for a party who needs the services of an interpreter? Is the cost of an interpreter covered by the program, or must the party pay himself? Even if someone speaks English sufficiently in an informal setting, she may feel more comfortable having an interpreter in a formal court-related process that will affect her rights and obligations. If the parties reach an agreement in mediation, do mediators merely give the agreement to the parties to read over themselves, or are the mediators instructed to read the agreement out loud, to ensure that everyone understands what they are agreeing to?

**Conclusion**

Twenty-five years later, has any progress been made? I believe the answer is a qualified yes. The Association for Conflict Resolution, the ABA Section of Dispute Resolution, the American Arbitration Association and the International Institute for Conflict Prevention & Resolution (CPR) all have undertaken initiatives to address these issues, but it is not enough. There is still much to be done. Understanding the issues is the first step, but it cannot be the last. ◆

**Endnotes**

1 For purposes of this article, “court-connected” is the term I will use to refer to mediations in which a case has been filed with a court and a judge either orders the parties to participate in a mediation or strongly encourages them to do so. The mediators may be court staff, volunteers or private practitioners. I also will use the broad definition of “minority” provided in Merriam-Webster’s dictionary: “a part of a population differing from others in some characteristics and often subjected to differential treatment.” While I believe there are differences between and among minority groups, the research data to date is too limited to empirically prove this.


3 From 1990 to 1991, Michelle Hermann, Gary LaFree, Christine Rack, and Mary Beth West conducted a study in Bernalillo County with data from the Metropolitan Court in Albuquerque, New Mexico. The results were published in several different articles including: Gary LaFree & Christine Rack, The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases, 30 Law & Soc’y Rev. 767 (1996) and Michelle Hermann, Gary LaFree, Christine Rack, & Mary Beth West, Univ. of New Mexico Inst. of Pub. Law, An Empirical Study of the Effects of Race and Gender on Small Claims Adjudication and Mediation (1993).


Editors’ note: Recognizing that conflict resolution procedures are being used and developed in a wide variety of multi-disciplinary settings, Dispute Resolution Magazine is launching a regular feature to showcase lessons to be learned from recent empirical studies of our broad field. Twice a year this feature will summarize, in the authors’ own words, published articles with research findings relevant to readers. The editors welcome suggestions for articles to include in future issues.

**MEDIATION**

**Multidimensional Analysis of Conflict Mediator Style**

*Kenneth Kressel, Tiffany Henderson, Warren Reich and Claudia Cohen*

30 Conflict Resol. Q. 135 (2012)

This study explores mediator stylistic variations in a sample of 17 professional and 5 novice mediators. Participants mediated the same simulated conflict between two college roommates and reported on their in-session thinking using a stimulated recall procedure. Mediators described themselves as stylistically eclectic and flexible, but this was not borne out by observational data: Whatever approach mediators began with tended to dominate their performance throughout. The researchers identified two dimensions underlying mediator performance: stylistic orientation (relational versus settlement-oriented) and level of empathic attunement. Qualitative analysis identified facilitative and evaluative variants of the settlement orientation and transformative and diagnostic variants of the relational orientation. The facilitative and diagnostic mediators performed more skillfully than their evaluative and transformative counterparts, but there was suggestive evidence that mediator identification with a particular formal model may be a less important determinant of outcomes than mediator energy, warmth and optimism; a nonjudgmental stance; and a willingness to adapt to the inclinations and needs of the parties. Practically speaking, the results suggest that consumers of mediation services should regard mediator self-descriptions skeptically and that mediators should cultivate methods of reflective learning and self-observation to increase professional self-awareness.

**Increasing Referrals to Small Claims Mediation Programs: Models to Improve Access to Justice**

*Heather Scheiwe Kulp*

14 Cardozo J. of Conflict Resol. 361 (Winter 2013)

This study is designed to assist managers of court, not-for-profit and other small claims mediation programs improve the rate and appropriateness of cases referred to mediation. After examining dispute system design characteristics of more than 50 small claims mediation programs, the constructed models offer dispute system designers common characteristics of programs with higher rates of referrals and settlements-per-referral. More important, the models articulate characteristics that work in particular settings or achieve certain goals, so that from this study, designers can customize a small claims mediation program based on available resources and intended goals. More effective referrals increase the likelihood that parties — especially self-represented litigants — will garner mediation’s benefits. Ideally, this study will prompt others to study how courts can design more effective mediation programs for small claims litigants, many of whom come to court seeking access to effective, problem-solving systems.

**ARBITRATION**


*Daniel Kaspar and Lamont Stallworth*

17 Harv. Negot. L. Rev. 1 (Spring 2012)

What impact, if any, does a grievant’s offer of apology have on the decision-making process of labor arbitrations in discipline and discharge cases? This study examined a number of arbitration awards over the decades in which a grievant offered an apology, showed remorse, asked for forgiveness, etc. The authors compared and contrasted these awards with those in which no such offer was made.

James Coben and Donna Stienstra are members of the Dispute Resolution Magazine editorial board. Coben is a Professor at Hamline University School of Law and a Senior Fellow at Hamline’s Dispute Resolution Institute. He can be reached at jcoben@hamline.edu. Stienstra is a Senior Researcher at the Federal Judicial Center. She can be reached at dstienst@fjc.gov.
but an arbitrator made known that he or she might have ruled differently had the grievant done so. In gauging the impact of an apology, the authors also looked at its timing (prior to/during a hearing, etc.). What the authors found may well inform practitioners, arbitrators, employers and HR consultants with respect to pre-decisional dispute resolution strategy: Sometimes an acknowledgment of a wrong, coupled with a display of contrition, will go a long way toward breaking down the barriers that are so often an impediment to resolving a dispute.

**NEGOTIATION**

*When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*

Zev Eigen  
41 J. of Legal Studies 67 (January 2012)

Negotiations often continue beyond the time when parties reach an agreement, when disputes arise about the enforceability of contract provisions. Sometimes, in spite of parties’ negotiations, one side unilaterally drafts the contract purporting to govern the parties’ ongoing relationship. This article reports the results of an online experiment that suggests individuals are more likely to comply with contracts they participated in negotiating (even marginally) than with ones they did not and that pre-consent notice of a contract term increases the likelihood of compliance with that term. The article also reports that post-agreement attempts to compel performance of an undesirable task/contract provision were more effective when a moral framing, rather than other frames, was used. A legal threat was significantly less effective and marginally less effective than a generic request to continue performing the task in the absence of any contract.

*How Can Women Escape the Compensation Negotiation Dilemma? Relational Accounts Are One Answer*

Hannah Riley Bowles and Linda Babcock  
37 Psychology of Women Q. 80 (March 2013)

Policymakers, academics and media reports all suggest that women could shrink the gender pay gap by negotiating more effectively for higher compensation, yet women entering compensation negotiations face a dilemma: Research shows that they are often penalized socially more than men for negotiating for higher pay, so a woman considering pay negotiations may have to weigh the benefits against the social consequences. To examine this dilemma, the authors tested strategies to help women improve both their negotiation and social outcomes in compensation negotiations. In Study 1, female negotiators improved social outcomes by communicating concern for organizational relationships, and they improved negotiation outcomes by offering a legitimate account for compensation requests (i.e., an outside offer). However, neither strategy — alone or in combination — improved both social and negotiation outcomes. Study 2 tested two strategies for improving social and negotiation outcomes by explaining why a compensation request is legitimate and by demonstrating concern for organizational relationships. Results showed that although adherence to the feminine stereotype is insufficient, using these “relational accounts” can improve women’s social and negotiation outcomes at the same time.

*The Advantages of Being Unpredictable: How Emotional Inconsistency Extracts Concessions in Negotiation*

Marwan Sinaceur, Hajo Adam, Gerben A. Van Kleef and Adam D. Galinsky  
49 J. of Experimental Social Psych. 498 (May 2013)

Integrating recent work on emotional communication with social science theories on unpredictability, the authors investigated whether communicating emotional inconsistency and unpredictability would affect recipients’ concession-making in negotiation. They hypothesized that emotional inconsistency and unpredictability would increase recipients’ concessions by making recipients feel less control over the outcome. In Experiment 1, pairs negotiated face-to-face after one negotiator within each pair expressed either anger or emotional inconsistency (by alternating between anger and happiness). In Experiment 2, participants received angry and/or happy messages from a simulated negotiation opponent. In Experiment 3, participants read a scenario about a negotiator who expressed either anger or emotional inconsistency by alternating between anger and disappointment. In all three experiments, emotional inconsistency induced recipients to make greater concessions compared to expressing a consistent emotion.

*Beyond Negotiated Outcomes: The Hidden Costs of Anger Expression in Dyadic Negotiation*

Lu Wang, Gregory Northcraft and Gerben Van Kleef  
119 Organizational Behavior and Human Decision Processes 54 (September 2012)

Anger frequently arises when people negotiate conflicting interests. This paper reports two experimental studies that examined the effects of expressing anger during negotiations. Results showed that expressing anger at the negotiation table can have both positive and
negative effects. On the one hand, expressing anger helps negotiators extract larger concessions from their opponents. Therefore, there are significant strategic benefits for anger expression. On the other hand, expressions of anger increase covert forms of retaliation by opponents. Given the insidious nature of covert relations, negotiators should take extra caution when expressing anger in negotiations.

**APOLOGY**

The Apology Mismatch: Asymmetries Between Victim’s Need for Apologies and Perpetrator’s Willingness to Apologize
Joost M. Leunissen, David De Cremer, Christopher P. Reinders Folmer and Marius van Dijke
49 J. of Experimental Social Psych. 315 (May 2013)

Are apologies delivered when victims desire them? Little is known about the congruence between a perpetrator’s willingness to apologize and a victim’s desire to receive an apology. In three experiments using student and employee samples, we showed that victims mainly desire an apology after intentional transgressions, whereas perpetrators want to offer an apology particularly after accidental transgressions. These results point to an apology mismatch: perpetrators and victims have divergent ideas about when an apology is necessary. The intentionality of the transgression triggered unique emotions in the parties involved, guilt (perpetrators) and anger (victims), which explained these divergent apology needs. This research gives further insights into the difficulties of post-conflict mediation due to these differing emotional reactions toward transgressions, resulting in different standpoints on when an apology should be issued. Moreover, it shows that an apology serves very different goals among perpetrators (restore the relationship) and victims (acknowledgement of injustice).

**AROUND THE WORLD**

East Asians’ Social Heterogeneity: Differences in Norms Among Chinese, Japanese, and Korean Negotiators
Sujin Lee, Jeannie Brett and Ji HyeAern Park
28 Negotiation J. 429 (October 2012)

Contrary to the widely held assumption that East Asian cultures are homogeneous in their value for harmonious social relationships, the researchers proposed that Chinese, Japanese and Korean managers would endorse different norms for negotiation tactics because of differences in the focus (dyadic in China versus group in Japan) and the nature (emotional in Korea versus instrumental in China) of social relations in these cultures. The data from a web survey of Chinese, Japanese, and Korean managers showed that managers from these three countries endorsed various distributive or integrative negotiation tactics consistent with their cultures’ different cultural emphases in business and other social relationships. When negotiating with managers from China, Japan, or Korea, it is worthwhile to try to understand the subtle differences among the countries’ social concepts — the Chinese guanxi (“refers to a mutually beneficial relationship between individuals”), the Japanese wa (“refers to a mutually beneficial relationship between individuals”) and the Korean inha (“refers to the harmony “embedded in dyadic relationships between, for example, subordinates and superiors, not group relationships between employees and the organization”) — to help construct the most effective and tailored negotiation approach.

**PROCEDURAL JUSTICE**

Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation
Ellen Berrey, Steve Hoffman and Laura Beth Nielsen
46 Law & Society Rev. 1 (March 2012)

A substantial body of research suggests that the legitimacy of the law crucially depends on the public’s perception that legal processes are fair. This study reveals that plaintiffs’ limited resources and tumultuous experiences in litigation lead them to see employment discrimination lawsuits as profoundly unfair. Employer-defendants, too, see discrimination litigation as unfair but tend to have resources to manage litigation challenges. Plaintiffs and defendants, however, see unfairness only in those aspects of the process that work to their disadvantage and do not share a common complaint. The study underscores the need for parties and professionals working with them to try to understand their disputes from each other’s perspective. It also highlights employers’ chief complaint (that employees can easily initiate litigation) and plaintiffs’ misunderstandings of litigation (including unrealistic expectations of getting their jobs back and getting a court ruling on the merits of their case). The study calls for a rethinking of empirical research on fairness, using techniques other than the now-standard social psychological experiment, to account for the real-life contexts in which people experience litigation.
A Tribute to Ben F. Overton

By John Upchurch and Catherine Klasne

The first Florida Supreme Court Justice to be chosen through the state’s merit selection and retention process, Ben F. Overton brought a peacemaker’s heart, a teacher’s credibility and a visionary’s passion to his years as a dispute resolution specialist. On Dec. 29, 2012, two weeks after turning 86, Overton died of post-surgical complications in Gainesville’s Shands medical center at the University of Florida, close to the school where he had earned his law degree in 1952.

Overton’s death sparked tributes and newspaper stories throughout the state of Florida and beyond. In a Gainesville Sun article, he was described as grading papers up to two days before his death; he was still an adjunct professor at the university. He continued to mediate for the Florida- and Alabama-based group Upchurch Watson White & Max until July 2012.

Overton had been active in national organizations, including the American Judicature Society and the American Bar Association. Overton’s activities in the ABA, of which he became a member in 1956, spanned decades; in the late 1970s, he chaired the ABA committee that drafted standards for judicial discipline. He worked on numerous other ABA committees and projects, including serving as Chair of the Section of Dispute Resolution from 2000 to 2001. Until just a few weeks before his passing, he had been leading committee projects for the ABA’s Criminal Justice Section.

Overton’s legal career was varied. After graduating from law school, he served as St. Petersburg city attorney and special assistant attorney general and worked in private practice. For nearly 10 years he served as circuit judge in the civil and criminal divisions of the 6th Judicial Circuit of Florida and then as chief judge of that circuit for almost four years. He was appointed to the Florida Supreme Court in 1974, served as Chief Justice from 1976 to 1978, and at the time of his retirement in 1999, was the senior member of the court.

One of Overton’s friends since the 1970s, James Alfini, said the justice’s contributions were indispensable in putting Florida at the forefront in the world of dispute resolution: “You need top judicial leadership of some sort. … In Florida, they had it in Ben Overton. He was the intellectual and spiritual leader for dispute resolution in Florida. He always made things move more quickly. That was his signal accomplishment.”

During her 20 years in the Florida state court administrators’ office running the Dispute Resolution Center, Sharon Press was often in touch with Overton. “In 1978, before I was in Florida, he appointed the first Supreme Court committee on dispute resolution alternatives. He was in the forefront in thinking that courts had a role in alternative dispute resolution, and he, in his role on the Florida Supreme Court, was very active in promoting that work. He had a strong sense of the role that alternative dispute resolution could play in a community,” Press continued. “Early on, he encouraged ADR options for small claims and community disputes, and he always had a strong commitment to families. … He was great at encouraging folks to look at family disputes in a different way, to make the process as humane as possible, especially for the children.”

John J. Upchurch is founder, President and CEO of Upchurch Watson White & Max, a mediation group with offices in five Florida and Alabama cities. He was among the first to become certified as a mediator by Florida’s Supreme Court and then served as chairman of the mediation group of the Cobb Cole & Bell law firm in Daytona Beach, from which Upchurch Watson White & Max evolved. He specializes in the resolution of complex multiparty disputes and commercial litigation and recently was certified as an e-discovery specialist. He can be reached at jupchurch@uww-adr.com. Catherine Klasne, a longtime features editor and writer for local newspapers, is media manager for Upchurch Watson White & Max. She can be reached at cklasne@uww-adr.com.
As a mediator, Overton was known as a definitive source for outlining possible judicial outcomes in specific disputes. “I used Ben often to help break settlement logjams in the bigger cases,” said Lawrence Watson, principal of Upchurch Watson White & Max, who recalled asking Overton to serve as the third-party neutral in cases where the parties had substantially differing positions on the law. The parties, Watson said, welcomed the opportunity to argue their side of the legal debate to Overton and secure valuable information concerning possible aspects of an adjudication option for resolving the dispute. The former justice sometimes would respond to the arguments, “Well, when I wrote the opinion in the case you are citing, here is what we intended to establish…”

In fact, Overton wrote more than 1,400 well-crafted opinions while on the court, according to his eulogist Robert H. Jerry II, Dean and Professor at the Fredric G. Levin College of Law at the University of Florida. Overton, Jerry recalled, lightheartedly referred to Jerry as “Boss” during Overton’s time at UF.

Overton was a leader in embracing many kinds of innovations within the court system. During his time on the bench, Florida became one of the first states to allow television cameras in the courtroom, and he was very involved in making the state’s Supreme Court one of the first to have its own web site. Dean Jerry recollected one of Overton’s many writings: “All members of the legal community should recognize the emergence of the information age and the rapid changes we see emanating from both science and industry. We must not be afraid of new technology or new ideas. Instead, we should use these evolving technologies in ways that best serve our legal community.”

Overton traveled a great deal across Florida and the entire continent. He and his wife, Marilyn (who died in 2005), used their RV to visit family and attend professional meetings. “Ben was an enthusiastic traveler,” said Larry Watson. “We’d see him at American College of Civil Trial Mediator retreats in Maine, New Hampshire and, if I’m not mistaken, Banff [in Canada]. Ben would also drive anywhere in Florida to conduct mediations.”

As James Alfini noted, “Overton was everybody’s cheerleader, helpful, giving of time, always very insightful.” Overton was able to look ahead and not be stuck in the present. He also served as a role model for how to make the best of our “senior” years. Even with his great wisdom and experience, he was always willing to learn something new. His friends and colleagues deeply miss his positive and energetic presence. ☑️

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Submit an Article to Dispute Resolution Magazine

The Dispute Resolution Magazine Editorial Board welcomes the submission of article concepts and drafts. The Editorial Board reviews all submissions and makes final decisions as to the publication of articles in Dispute Resolution Magazine.

In addition to articles on topics relevant to the field of dispute resolution, the Editorial Board welcomes the submissions of concepts and drafts related to the following features:

**Book reviews**
- Ethics and ADR
- Case law and legislative updates
- International developments in ADR
- Recent social science research
- Interviews with leading ADR practitioners, academics, organizational directors

Email submissions to Gina Brown, editor, at gina.brown@americanbar.org. Submission Guidelines are available on the Publications page of the Section of Dispute Resolution web site: www.americanbar.org/dispute.
Effective Vindication Doctrine Does Not Invalidate Class Arbitration Waiver When Cost of Proving Claim Exceeds Potential Recovery

In American Express Co., v. Italian Colors Restaurant, 570 U.S. ___ (2013), the Supreme Court held that the Federal Arbitration Act does not permit courts to invalidate a class arbitration waiver because the cost of individually arbitrating a claim exceeds the potential recovery. The Court explained that the effective vindication doctrine prevents waiver of a party’s right to pursue a statutory remedy, but the fact that it’s not economical to prove a statutory remedy does not “constitute the elimination of the right to pursue that remedy.”

Arbitrator Did Not Exceed Powers by Interpreting Arbitration Agreement to Permit Class Arbitration

In Oxford Health Plans, LLC v. Sutter, 569 U.S. ___ (2013), the Supreme Court unanimously held that an arbitrator did not exceed his powers in determining that class arbitration was permitted by the party’s contract. The Court distinguished Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 559 U.S. 662 (2010) by explaining that in this case the arbitrator did his job and interpreted the contract, whereas in Stolt-Nielsen the arbitrators abandoned their interpretive role. The Court went on to say “that convincing a court of an arbitrator’s error — even his grave error — is not enough . . . the courts have no business overruling him because their interpretation of the contract is different from his.” Thus, because the arbitrator arguably interpreted the contract, courts may not correct his mistakes. To read more: http://www.supremecourt.gov/opinions/12pdf/12-135_elp3.pdf.

Narrow ‘Public Injunction’ Exception to Federal Arbitration Act Does Not Apply When Violations Have Ceased and Affected Class is Relatively Small

In Kilgore v. Keybank Nat’l Ass’n, No. 10-15934 (9th Cir. 2013), the Ninth Circuit held that a narrow “public injunction” exception to the Federal Arbitration Act did not apply. Under the Broughton-Cruz rule, which the Ninth Circuit assumes is still valid after Concepcion, an otherwise valid arbitration agreement will not be enforced when plaintiffs are seeking injunctive relief that benefits the general public rather than the party bringing the action. In Kilgore, the exception does not apply because the beneficiaries of an injunction are a small class of former students and the flight school they attended had already shut down. Thus, because the alleged statutory violations had already ceased and the class affected is small, the public injunction exception does not apply. To read more: http://cdn.ca9.uscourts.gov/datastore/opinions/2013/04/11/09-16703.pdf.

J.D. Hoyle is a law clerk with the ABA Section of Dispute Resolution. Kristen A. Erthum is a rising 3L at George Mason University School of Law.

One Defendant May Not Compel Arbitration in Case with Multiple Defendants Because of Risk of Inconsistent Rulings

In Barsegian v. Kessler & Kessler, 215 Cal. App. 4th 446 (Cal. Ct. App. 2013), the California Court of Appeals upheld a trial court’s denial of a motion to compel arbitration on the grounds that arbitration between two, and not all, of the parties could create inconsistent rulings. The Court of Appeals rejected the argument alleging that all defendants were the same person or agents of each other because doing so would create the precedent that “as long as one defendant had entered into an arbitration agreement with the plaintiff, every defendant would be able to compel arbitration, regardless of how tenuous or nonexistent the connections among the defendants might actually be.” To read more: http://www.courts.ca.gov/opinions/documents/B237044.pdf.

Arbitration Clause in Preprinted Sales Contract Containing Automatic Appeals and Given to Consumers on Take-It-or-Leave-It Basis is Procedurally and Substantively Unconscionable

In Vargas v. Sai Monrovia B, Inc., ___ Cal. Rptr. 3d. ____ (2013 WL 2419044, Cal. Ct. App. 2013), the California Court of Appeals reversed a trial court’s order compelling arbitration on the grounds that the arbitration clause was invalid because it was so permeated with unconscionability. The court held that the contract was procedurally unconscionable because the arbitration clause was located on the back of a large form with small print and given to the customer on a “take-it-or-leave-it” basis. Moreover, the arbitration clause was substantively unconscionable because it contained multiple unconscionable clauses: it allowed for an appeal of an arbitral award in excess of $100,000 or in cases of injunctive relief to a panel of three arbitrators; it stated that the appealing party must prepay all filing fees and arbitration costs; and it exempted the self-help method of repossession from arbitration. To read more: http://www.courts.ca.gov/opinions/documents/B237257.pdf.

Court Must First Determine Who is to Decide Whether Dispute is Arbitrable

In VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II L.P., No. 12–593–cv, 2013 WL 2372286 (2d Cir. 2013), the Second Circuit vacated and remanded the district court’s decision and declined to enforce the foreign arbitration award because it determined that the claim did not fall within the scope of the arbitration agreement. The court clarified that the question of “who is to decide whether a dispute is arbitrable” must be answered before the question of “whether a dispute is arbitrable.” This decision is for the district court unless the parties “clearly and unmistakably assign such questions to arbitration.” The Second Circuit found that the district court did not consider whether the agreement between the parties clearly indicated that an arbitrator or a court was to decide the question. To read more: http://www.ca2.uscourts.gov/decisions/isysquery/4f8e5b26-c395-4a63-9e88-a29030470430/10/doc/12-593_opn.pdf.
2013 Officers and Council Candidate Slate Announced

The Nominations Committee has announced the nominees for Section of Dispute Resolution Officer and Council Positions. The nominees will be voted on by the Section membership at the Annual Meeting of the membership on August 10, 2013, at 2pm at the Westin Market Street Hotel in San Francisco.

The nominees for positions with terms starting in August 2013 are:
- Chair-Elect (1-year term): Geetha Ravindra, Richmond, VA
- Vice-Chair (1-year term): Howard Herman, San Francisco, CA
- Budget Officer (1-year term): Nancy Welsh, Carlisle, PA

- Council Member-at-Large Positions: Charles Crumpton, Honolulu, HI (3-year term); Harrie Samaras, West Chester, PA (3-year term); Myra Selby, Indianapolis, IN (3-year term); Stuart Widman, Chicago, IL (3-year term); Jillisa Brittan, Chicago, IL (1-year term); and Joanna Jacobs, Washington, DC (1-year term).

Code of Ethics for Arbitrators in Commercial Disputes, Annotated, Gets an Update

The ABA Section of Dispute Resolution Arbitration Committee, along with the Ethics Committee of the College of Commercial Arbitrators, are proud to announce the release of the updated Code of Ethics for Arbitrators in Commercial Disputes, Annotated.

The document (which can be accessed with the link below) includes annotations to the Code of Ethics for Arbitrators in Commercial Disputes and provides citations to judicial decisions and other published writings that cite the 1977 or 2004 codes. Although the code has been referred to for guidance and has been cited by many courts, it does not have the force of law and cannot in itself provide a basis for judicial decision. The code can be accessed at: http://ambar.org/arbcodeann.

New Resource Database Coming Soon

As part of the Section of Dispute Resolution’s ongoing efforts to serve its members and help them in this digital age, the Section is launching a new resource website this summer that contains all the Section’s resource materials in an easily searchable database. Each resource is searchable by type, committee and practice area and is summarized in a brief description or abstract.

ABA Clearinghouse for Mediator Ethics Opinions Updated and Expanded

The ABA’s National Clearinghouse for Mediator Ethics Opinions has been updated to include opinions through June 1, 2013. The database has also been expanded to include previously unrepresented states and now contains both advisory disciplinary opinions as well as guidelines for best practices on a variety of topics relevant to the practice of mediation and ethical standards for mediators, attorneys and judges. Some of the more interesting trends and topics from this year’s update include:

- FL-2012-001-OP and FL-2012-009-OP (Florida 2012/2013) These two opinions revolve around whether a mediator can report whether parties have reached a signed or unsigned agreement.
- GA-2012-004-OP (Georgia 2012). A mediator was reprimanded for breach of confidentiality, self-determination and impartiality when she did not stay for the full mediation, testified on her directions for a “full and final agreement” in court and wrote a letter to both parties chastising them for their failure to reach a full and final agreement.
- FL-2012-004-OP and GA 2012-005-OP (Florida/Ga 2012). There is no bright-line time limit after a mediation in which a mediator must refrain from engaging in social or professional conduct with former mediation clients.

The complete database can be accessed on the ABA Section of Dispute Resolution’s website at http://ambar.org/DREthicsopinions. Periodic updates will continue this summer; if you have additions to the database from your state, please send them to Matthew.Conger@americanbar.org. ♦
Teleconference: Good Faith Bargaining Ethical Issues  
September 10, 2013

Teleconference: Drafting Arbitration Awards  
September 24, 2013

Teleconference: Stories Mediators Tell  
November 19, 2013

11th Annual Advanced Mediation & Advocacy Skills Institute  
November 21-22, 2013  
Nashville, TN

Teleconference: Managing the Arbitration  
January 2014

2014 ABA Midyear Meeting  
February 5 – 11, 2014  
Chicago, Illinois

Teleconference: Lessons from Lincoln  
February 11, 2014

Teleconference: Arbitration Ethics  
March 11, 2014

2014 Dispute Resolution Section Spring Conference  
April 2 – 5, 2014  
Hyatt Regency Miami, FL

2014 ABA Annual Meeting  
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